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THE FORDHAM URBAN LAW JOURNAL: A NEW MILLENNIUM

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Cover Page Footnote

Wilkinson Professor of Law, Fordham University School of Law; B.S., Fordham University, 1953; J.D., Fordham University School of Law, 1957; LL.M., New York University School of Law, 1963; Public Member of Securities Industry Conference on Arbitration since its inception in 1977; Public Member of National Arbitration Committee of the NASD, 1975-81; Public Arbitrator at the NASD (since 1968) and NYSE (since 1971); Arbitrator Trainer at NASD and NYSE (since 1994); Mediator at the NASD and NYSE (since 1997). Special thanks and appreciation is extended to Kevin Bucknor and Erica Hicks who assisted in the compilation and preparation of this Article.

THE *FORDHAM URBAN LAW JOURNAL*: A NEW MILLENNIUM

Constantine N. Katsoris*

INTRODUCTION

First published in 1972, the *Fordham Urban Law Journal* (the "Journal") is the second oldest legal publication at the Fordham University School of Law.¹ When the *Journal* was first published, it was originally intended to supplement the *Fordham Law Review* by providing a forum for scholars and students to publish legal literature addressing urban issues facing New York City. Through the tireless efforts of its editorial staff, faculty advisors, and members, the *Journal* has expanded into a nationally recognized scholarly publication that has issued over 20,000 pages of articles, essays, reports, notes, and comments—far exceeding the visions and expectations of its founding student members, faculty advisor, and financial supporters. This evolution of excellence continues into the new millennium, with the *Journal* now available electronically on both Lexis² and Westlaw,³ and the entire archive of the *Journal* soon to be available on Hein-on-Line.⁴

In 1992, the *Journal* celebrated its twentieth anniversary. In recognition of that milestone, a special article entitled, *The Fordham Urban Law Journal: Twenty Years of Progress*,⁵ traced the historical development of the *Journal* since its inaugural article, which was

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1. Besides the *Fordham Law Review* and the *Fordham Urban Law Journal*, there are four additional journals presently being published at the Fordham University School of Law: the *Fordham International Law Journal*; the *Fordham Intellectual Property, Media and Entertainment Law Journal*; the *Fordham Environmental Law Journal*; and the *Fordham Journal of Corporate and Financial Law*.

2. The LexisNexis Research System Homepage, at <http://www.lexis.com>.

3. The Westlaw Homepage, at <http://www.westlaw.com>.

4. The Hein-on-Line website, at <http://www.heinonline.org>.

5. Constantine N. Katsoris, *The Fordham Urban Law Journal: Twenty Years of Progress*, 19 FORDHAM URB. L.J. 915 (1992).

written by then New York State Attorney General Louis J. Lefkowitz, discussing the unique environmental problem's of New York City's Jamaica Bay.⁶

This year the *Journal* celebrates another milestone in its development—its Thirtieth Anniversary—and *this* Article seeks to provide a historical reflection on the *Journal's* proud history and success in addressing various local, national, and international urban issues over the course of the last *ten* years.

I. CHRONOLOGICAL REVIEW

Since its first publication in 1972, the *Journal* has expanded its coverage from primarily highlighting urban issues affecting New York City, to a broader coverage of related national and international issues. Besides the publication of scholarly articles, essays, reports, notes, and comments, the *Journal* expanded its coverage by becoming more involved in planning, organizing, and sponsoring numerous symposia and conferences, gathering together the collective thoughts of acknowledged experts on various problems and issues.

In the spring of 1992, the *Journal* began to publish an annual symposium issue in conjunction with the Louis Stein Center for Ethics and Public Interest Law.⁷ In 2001, the William and Burton Cooper Chair on Urban Legal Issues began to co-sponsor the annual symposium issue. This annual issue explores various urban challenges facing New York City and typically includes several articles written by various legal scholars and practitioners. Subsequent issues have addressed such topics as environmental justice,⁸ welfare reform,⁹ urban bioethics,¹⁰ the changing role of the federal prosecutor,¹¹ forgiveness and the law,¹² privatization,¹³ problem-solving

6. Louis J. Lefkowitz, *Jamaica Bay: An Urban Marshland in Transition*, 1 FORDHAM URB. L.J. 1 (1972).

7. Symposium, *First Annual Stein Center Symposium on Contemporary Urban Challenges: Big Cities, Big Problems: Solutions for the 1990s*, 19 FORDHAM URB. L.J. 567 (1992).

8. Symposium, *Third Annual Stein Center Symposium on Contemporary Urban Challenges: Urban Environmental Justice*, 21 FORDHAM URB. L.J. 425 (1994) [hereinafter Symposium, *Urban Environmental Justice*].

9. Symposium, *Fourth Annual Stein Center Symposium on Contemporary Urban Challenges: Urban Welfare Reform*, 22 FORDHAM URB. L.J. 857 (1995).

10. Symposium, *Sixth Annual Stein Center Symposium on Contemporary Urban Challenges: Urban Bioethics: A Symposium on Health Care, Poverty, and Autonomy*, 24 FORDHAM URB. L.J. 663 (1997).

11. Symposium, *Eighth Annual Stein Center Symposium on Contemporary Urban Challenges: The Changing Role of the Federal Prosecutor: In Memory of William Tandy*, 26 FORDHAM URB. L.J. 347 (1999).

courts,¹⁴ and the post-incarceration consequences of criminal convictions.¹⁵

As for significant public events and reports, Volume 20 included several reports drafted by the committee on Professional Responsibility of the Association of the Bar of the City of New York. The reports focused on various ethical issues relating to attorney cost allocation in class action suits,¹⁶ plaintiff incentive awards in class actions,¹⁷ attorney disclosure of client confidences in situations where clients use the attorney's services in committing fraudulent or criminal acts,¹⁸ restrictions on attorney speech,¹⁹ and the ethical issues which might arise when a lawyer leaves a firm.²⁰ One of the reports, *Financial Arrangements in Class Action, and the Code of Professional Responsibility*, which was cited by the Ninth Circuit in *Boccardo v. Commissioner of Internal Revenue*,²¹ also made several recommendations to amend the American Bar Association's Model Code of Professional Responsibility and the American Bar Association's Model Rules of Professional Responsibility.²² Some of the Committee's recommendations were adopted by the American Bar Association when it drafted Disciplinary Rule 5-103 (b) and Model Rule 1.8(b).

12. Symposium, *Ninth Annual Stein Center Symposium on Contemporary Urban Challenges: The Role of Forgiveness in the Law*, 27 FORDHAM URB. L.J. 1347 (2000) [hereinafter Symposium, *Forgiveness in the Law*].

13. Symposium, *Tenth Annual Symposium on Contemporary Urban Challenges: Redefining the Public Sector: Accountability and Democracy in the Era of Privatization*, 28 FORDHAM URB. L.J. 1303 (2001) [hereinafter Symposium, *Privatization*].

14. Symposium, *Eleventh Annual Symposium on Contemporary Urban Challenges: Problem Solving Courts: From Adversarial Litigation to Innovative Jurisprudence*, 29 FORDHAM URB. L.J. 1751 (2002).

15. Symposium, *Twelfth Annual Symposium on Contemporary Urban Challenges: Beyond the Sentence: Post-Incarceration Legal, Social, and Economic Consequences of Criminal Convictions*, 30 FORDHAM URB. L.J. (forthcoming 2003).

16. Comm. on Prof'l Responsibility, Ass'n of the Bar of the City of N.Y., *Financial Arrangements in Class Action, and the Code of Professional Responsibility*, 20 FORDHAM URB. L.J. 831 (1993).

17. *Id.*

18. Comm. on Prof'l Responsibility, Ass'n of the Bar of the City of N.Y., *Report on the Debate Over Whether There Should Be an Exception to Confidentiality for Rectifying a Crime or Fraud*, 20 FORDHAM URB. L.J. 857 (1993).

19. Comm. on Prof'l Responsibility, Ass'n of the Bar of the City of N.Y., *The Need for Fair Trials Does Not Justify a Disciplinary Rule that Broadly Restricts an Attorney's Speech*, 20 FORDHAM URB. L.J. 881 (1993).

20. Comm. on Prof'l Responsibility, Ass'n of the Bar of the City of N.Y., *Ethical Issues Arising When a Lawyer Leaves a Firm: Restrictions on Practice*, 20 FORDHAM URB. L.J. 897 (1993).

21. 56 F.3d 1016, 1019 (9th Cir. 1995).

22. Comm. on Prof'l Responsibility, *supra* note 16, at 848.

Volume 20 also featured an article entitled *Jails and Prisons—Reservoirs of TB Disease: Should Defendants with HIV Infection (Who Cannot Swim) Be Thrown Into The Reservoir?*,²³ which argued for a reevaluation of and a departure from the mandatory sentencing laws in cases where the defendant is HIV-infected.²⁴ The article opposed the restrictions placed on plea bargaining, stating that the safety and welfare of the community is not enhanced by the compulsory dumping of HIV-infected people into prisons,²⁵ and was cited by the United States Court of Appeals for the Eighth Circuit in a dissenting opinion by Judge William R. Wilson, United States District Judge for the Eastern District of Arkansas sitting by designation in *United States v. Rabins*.²⁶

In addition, Volume 20 also contained articles, essays, and notes covering the First Amendment and employment, copyright, housing, banking, and family law. The Volume also featured the second annual Stein Symposium Issue, which focused on fairness at all stages of the urban criminal justice system,²⁷ and included several essays by judges, bar and civic leaders, prosecutors, criminal defense lawyers, and academics.

Volume 21 contained the works from the third annual Stein Center Symposium on Contemporary Urban Challenges,²⁸ and included several pieces focused on the environmental challenges facing poor urban communities, as well as articles addressing gay and lesbian issues. In addition, it contained a report by the *Temporary State Commission on Local Government Ethics*,²⁹ which was written in response to the *Feerick Report* issued by the Commission on Government Integrity.³⁰

In Volume 22, the *Journal* published a number of significant articles including a discussion of the proposal to add rules 413 to 415 to

23. Faith Colangelo & Mariana Hogan, *Jails and Prisons—Reservoirs of TB Disease: Should Defendants with HIV Infection (Who Cannot Swim) Be Thrown Into The Reservoir?*, 20 FORDHAM URB. L.J. 467 (1993).

24. *Id.* at 469-70.

25. *Id.*

26. 63 F.3d 721, 742 n.6, 743 n.8, 744 n.10 (8th Cir. 1995) (Wilson, J., dissenting).

27. Symposium, *Second Annual Stein Center Symposium on Contemporary Urban Challenges: Urban Challenges: Urban Criminal Justice: Is it Fair? Does it Appear Fair?*, 20 FORDHAM URB. L.J. 377 (1993).

28. Symposium, *Urban Environmental Justice*, *supra* note 8, at 425.

29. *Temporary State Commission on Local Government Ethics: Final Report*, 21 FORDHAM URB. L.J. 1 (1995).

30. N.Y. State Comm'n on Gov't Ethics, *Municipal Ethical Standards: The Need for a New Approach*, in GOVERNMENT ETHICS REFORM FOR THE 1990'S: THE COLLECTED REPORTS OF THE NEW YORK STATE COMMISSION ON GOVERNMENT INTEGRITY 618 (Bruce A. Green ed., 1991).

the Federal Rules of Evidence,³¹ as well as a timely report entitled *Report of The Securities Industry Conference on Arbitration and Representation of Parties in Arbitration by Non Attorneys*.³²

Evidencing the *Journal's* increased diversity of coverage, Volume 23 contained several articles discussing civil rights, welfare reform, the death penalty, professional responsibility, criminal law, sexual harassment, banking, and antitrust issues. In addition, this volume included the publication of several articles from a symposium sponsored by the *Journal* in conjunction with the Stein Center and the New York Commission on Human Rights, as well as a commemoration of the *fortieth anniversary* of the New York Commission on Human Rights.³³

Book One of Volume 24 was dedicated to the memory of Louis Stein.³⁴ This volume featured a number of articles and essays discussing various issues relating to health care reform,³⁵ commercial

31. Norman M. Garland, *Some Thoughts on the Sexual Misconduct Amendments to the Federal Rules of Evidence*, 22 FORDHAM URB. L.J. 355 (1995); Edward J. Imwinkelried, *Undertaking the Task of Reforming the American Character Evidence Prohibition: The Importance of Getting the Experiment Off on the Right Foot*, 22 FORDHAM URB. L.J. 285 (1995); David P. Leonard, *The Federal Rules of Evidence and the Political Process*, 22 FORDHAM URB. L.J. 305 (1995); Roger C. Park, *The Crime Bill of 1994 and the Law of Character Evidence: Congress Was Right About Consent Defense Cases*, 22 FORDHAM URB. L.J. 271 (1995); Myrna S. Raeder, *American Bar Association Criminal Justice Section Report to the House of Delegates*, 22 FORDHAM URB. L.J. 343 (1995).

32. *Report of the Securities Industry Conference on Arbitration on Representation of Parties in Arbitration by Non-Attorneys*, 22 FORDHAM URB. L.J. 507, 524 (1995). The report, drafted by the Securities Industry Conference on Arbitration ("SICA"), addressed serious concerns with the quality and adequacy of representation by non-attorneys in the resolution of securities disputes. See Constantine N. Katsoris, *Foreword to Report of the Securities Industry Conference on Arbitration on Representation of Parties in Arbitration by Non Attorneys*, 22 FORDHAM URB. L.J. 503, 503-06 (1995). This report was widely circulated, and was sent to each attorney general and each state bar association in the country.

33. Rolando T. Acosta, *A Response to Burt Neuborne*, 23 FORDHAM URB. L.J. 1165 (1996); Victor A. Bolden, *Where Does New York City Go From Here: Chaos or Community?*, 23 FORDHAM URB. L.J. 1031 (1996); Victor M. Goode, *Some Thoughts and Reflections on the Fortieth Anniversary of the New York City Human Rights Commission*, 23 FORDHAM URB. L.J. 1053 (1996); Berta Esperanza Hernandez-Truyol, *Natives, Newcomers and Nativism: A Human Rights Model for the 21st Century*, 23 FORDHAM URB. L.J. 1075 (1996); Burt Neuborne, *Who's Afraid of the Human Rights Commission?*, 23 FORDHAM URB. L.J. 1139 (1996); Michael H. Schill, *Local Enforcement of Laws Prohibiting Discrimination in Housing: The New York City Human Rights Coalition*, 23 FORDHAM URB. L.J. 991 (1996); Marta B. Varela, *The First Forty Years of the Commission on Human Rights*, 23 FORDHAM URB. L.J. 983 (1996).

34. 24 FORDHAM URB. L.J. vii (1997). The initial funding for the *Fordham Urban Law Journal* came from Louis Stein, Class of 1926. Katsoris, *supra* note 5, at 917.

35. Tricia Asaro & Lewis D. Solomon, *Community-Based Health Care: A Legal and Policy Analysis*, 24 FORDHAM URB. L.J. 235 (1997); Robert J. Brent, *Profits, Pov-*

zoning in New York City, immigration, securities arbitration, drug policy reform, the Fifth Amendment, and intellectual property.

Volume 25 commemorated the *Journal's Twenty-Fifth Anniversary* and exceeded nine hundred pages. It included two symposia publications and a special report commissioned by Thomas V. Ognibene, Minority Leader of the New York City Council,³⁶ that examined the compensation package of executive directors of not for profit organizations doing business in New York City.³⁷

Volume 25 also included, for the first time in the *Journal's* history, a CD-Rom supplement. The CD-Rom entitled *So Goes a Nation: Lawyers and Communities* was a reproduction of an inspirational video by the same name. The Louis Stein Center for Ethics and Public Interest Law at the Fordham University School of Law collaborated with New York Lawyers for the Public Interest and the *Fordham Urban Law Journal* to produce *So Goes a Nation: Lawyers and Communities*, a documentary video highlighting three innovative approaches to community lawyering. The CD-Rom included narratives by actors Sam Waterson and Jimmy Smits and highlighted the perspective of contemporary law students on lawyering for the poor. This innovative multimedia format was included as a supplement to the various articles and notes discussing the topic of community lawyering.

Volume 26 was dedicated to John D. Feerick, the legendary Dean of the Fordham University School of Law from 1982 until 2002.³⁸ With Volume 26, the number of books published per volume increased from four to six. Book Five of Volume 26 was particularly noteworthy because it included the color publication of a selection of several of the posters from *Civil Disturbance: Battles for Justice in New York City*,³⁹ a public artwork exhibition, which resulted from the collaboration between various artist and lawyers, and memorialized the legal achievements and the continued strug-

erty, and Health Care: An Examination of the Ethical Base of Economics, 24 FORDHAM URB. L.J. 667 (1997); Lewis R. Goldfrank, *The Public Hospital*, 24 FORDHAM URB. L.J. 703 (1997); Robert L. Hubbard, *Toward a Competitive Health Care System*, 24 FORDHAM URB. L.J. 683 (1997); Maria O'Brien Hylton, *Some Preliminary Thoughts on the Deregulation of Insurance to Advantage the Working Poor*, 24 FORDHAM URB. L.J. 683 (1997).

36. Council of the City of N.Y., *To Profit or Not-to-Profit: An Examination of Executive Compensation in Not-For-Profit Organizations Contracting with New York City: A Staff Report to Hon. Thomas V. Ognibe*, 25 FORDHAM URB. L.J. 471.

37. *Id.* at 472-73.

38. 26 FORDHAM URB. L.J. vii-viii (1998).

39. Collection, *Civil Disturbance: Battles for Justice in New York City*, 25 FORDHAM URB. L.J. 1299 (1999).

gle for social justice in New York City. Also included in this special publication were a number of essays discussing some of the cases depicted by the posters.

Book Six of Volume 27 was dedicated to the Cooper Family, recognizing the great generosity of the family in endowing the Fordham University School of Law with the William and Burton Cooper Chair in Urban Legal Issues.⁴⁰ Volume 27 further exemplified the Journal's increased sponsorship and coverage of important symposia and conferences. In addition to the publication of the ninth annual Stein Symposium Issue, it included works from a symposium on domestic violence and a special publications issue of a symposium entitled *Civil Rights Law in Transition: The Forty-Fifth Anniversary of the New York City Commission on Human Rights*.⁴¹ This symposium was organized in conjunction with the New York City Commission on Human Rights and featured articles focusing on domestic violence, disability law, sexual harassment, and hate crimes legislation.

Volume 27 also published a thought-provoking article by Margaret Colgate Love entitled *Of Pardons, Politics and Collar Buttons: Reflections on the President's Duty to be Merciful*.⁴² The article provided an insightful analysis of the President's power to pardon, and was reported in the *National Law Journal*⁴³ and widely cited by news publications including: the *New York Times*,⁴⁴ the *Milwaukee Journal Sentinel*,⁴⁵ the *Pittsburgh Post-Gazette*,⁴⁶ and the *Plain Dealer*.⁴⁷

Volume 28 included two special issues, "The Drug Policy Debate" and "The Challenge of Urban Policing." The other four books in this volume contained articles and conference publica-

40. Dedication, 27 FORDHAM URB L.J. 1735 (2000).

41. Symposium, *Civil Rights Law in Transition: The Forty-Fifth Anniversary of the New York City Commission on Human Rights*, 27 FORDHAM URB L.J. 1105 (2000) [hereinafter Symposium, *Civil Rights Law in Transition*].

42. Margaret Colgate Love, *Of Pardons, Politics and Collar Buttons: Reflections on the President's Duty to be Merciful*, 27 FORDHAM URB. L.J. 1483 (2000).

43. Michael D. Goldhaber, *And Now, for the Rest of Clinton's Clemency Story*, NAT'L L.J., Aug. 14, 2000, at A1.

44. William Safire, *Pardon Me, But. . .*, N.Y. TIMES, Aug. 24, 2000, at A27.

45. William Safire, *Don't Bet Clinton Will Be Doing Time*, MILWAUKEE JOURNAL-SENTINEL, Aug. 25, 2000, at 23A.

46. William Safire, *No Beg Your Pardon Is Necessary; Let the Independent Counsel and Grand Jury Lay Out Detailed Charges*, PITTSBURGH POST-GAZETTE, Aug. 25, 2000, at A21.

47. William Safire, *Gore Dodges the Pardon Issue; How do We Uphold the Law When Most of the Country Wants to 'Move On'?*, PLAIN DEALER (Cleveland, Ohio), Aug. 25, 2000, at 11B.

tions addressing such topics as welfare reform, alternative dispute resolution, the professional responsibility of lawyers, Asian American voting rights, and fair housing for the handicapped among other topics. Volume 28 also published the proceedings of the Tenth Annual Symposium on Contemporary Urban Challenges, entitled *Redefining the Public Sector: Accountability and Democracy in the Era of Privatization*.⁴⁸

Volume 29 was dedicated to the memory of William J. Moore, the Dean of Admissions at the Fordham University School of Law from 1970 to 2000.⁴⁹ Volume 29 featured the first series of articles from the William and Burton Cooper Chair in Urban Legal Issues on the legal implications of the census. It also contained a special issue entitled "Education Law and Policy," and two special series, "New Urbanism and Smart Growth" and "Judicial Independence."

Volume 30 published a series of articles from a conference entitled "Religious Values and Legal Dilemmas in Bioethics" as well as an address from Avery Cardinal Dulles on the inauguration of the Catholic Lawyers' Program of the Institute of Religion, Law and Lawyer's Work at the Fordham University School of Law. Volume 30 also included articles on topics such as drug policy, law enforcement, criminal offenders, increasing Latino representation in law schools, and homelessness.

No single legal theme has dominated the *Journal's* agenda during the past ten years, as is evident from the above chronological recap. Its focus has been diverse and broad, and has included such wide-ranging issues as criminal law, environmental law, ethics, family law, housing, constitutional law, professional responsibility, health law, zoning, the First Amendment, dispute resolution, taxation, securities regulation, the death penalty, domestic violence, the drug policy debate, and civil rights, to name just a few.

II. TOPICAL REVIEW

A. Drug Policy

In October of 2000 the *Journal* published, in Book One of Volume 28, a special issue focused on the effectiveness of the United States drug policy and also included the proceedings from an interdisciplinary conference that explored the topic in detail. The publication additionally contained several articles addressing key legal, medical, and scientific issues related to drug policy. In Volume 30,

48. Symposium, *Privatization*, *supra* note 13, at 1303.

49. 29 FORDHAM URB. L.J. 1 (2001).

the *Journal* published a debate on the efficacy of United States drug policy held at the Fordham University School of Law between Graham Boyd of the American Civil Liberties Union and Asa Hutchison, then Administrator of the Drug Enforcement Agency.⁵⁰

B. Domestic Violence

The *Journal's* commitment to the coverage of issues relating to domestic violence is evidenced by the publication of numerous articles, notes, and comments on that topic. Volume 27, for example, published a symposium issue entitled *Women, Children and Domestic Violence: Current Tensions and Emerging Issues*,⁵¹ which focused on the legal encounters of mothers who are victims of domestic violence. This issue also contained several articles that detailed the experiences of mothers who, while seeking orders of protection in New York City's Family Court, contemporaneously found themselves the subject of child neglect proceedings. In Volume 29, the *Journal* published the proceedings from another domestic violence conference, *Revolutions Within Communities*,⁵² which focused on mainstream legal responses to domestic violence, immigrant victims of domestic violence and the unique social and legal problems that gay and lesbian victims of domestic violence encounter.

C. The Death Penalty

The *Journal* has sponsored and covered numerous programs concerning the death penalty, including symposia entitled *Are Executions in New York Inevitable?*,⁵³ sponsored by the Association of the Bar of the City of New York, and *Politics and the Death Penalty: Can Rational Discourse and Due Process Survive the Perceived Political Pressure?*,⁵⁴ sponsored by the American Bar Association Section of Individual Rights and Responsibilities. In the winter of 1998, it published an article entitled *Constitutional Challenges to*

50. *The Fordham Law Drug Policy Reform Project: America's Oldest War: The Efficacy of United States Drug Policy—A Debate Between Graham Boyd, ACLU and Asa Hutchinson, DEA*, 30 FORDHAM URB. L.J. 401 (2003).

51. Symposium, *Women, Children and Domestic Violence: Current Tensions and Emerging Issues*, 27 FORDHAM URB. L.J. 565 (2000).

52. Conference, *Revolutions Within Communities: The Fifth Annual Domestic Violence Conference*, 29 FORDHAM URB. L.J. 13 (2001).

53. Symposium, *Are Executions in New York Inevitable?*, 22 FORDHAM URB. L.J. 557 (1995).

54. Symposium, *Politics and the Death Penalty: Can Rational Discourse and Due Process Survive the Perceived Political Pressure?*, 21 FORDHAM URB. L.J. 239 (1994).

New York State's Death Penalty Statute,⁵⁵ which argued that the New York Death Penalty Statute is constitutionally flawed, discussed the numerous constitutional infirmities of the New York Statute, and recommended guidelines to assist in the capital selection process.⁵⁶

D. Civil Rights

The *Journal* has also published articles, notes, and comments on various aspects of civil rights, including numerous student notes addressing issues such as hate crimes legislation,⁵⁷ affirmative action jurisprudence,⁵⁸ and the Violence Against Women Civil Rights Act.⁵⁹ Additionally the *Journal* has hosted and sponsored various conferences focused on civil rights.⁶⁰

E. Securities Regulation

Moreover, during the last ten years, the *Journal* has continued its in-depth coverage regarding the resolution of securities disputes.⁶¹ In Volume 22, the *Journal* published the widely disseminated Report of the Securities Industry Conference on Arbitration ("SICA") on the representation of parties in arbitration by non-

55. John M. Shields, *Constitutional Challenges to New York State's Death Penalty Statute*, 25 FORDHAM URB. L.J. 255 (1998).

56. *Id.* at 255-78.

57. Kevin N. Ainsworth, *Targeting Conduct: A Constitutional Method of Penalizing Hate Crimes*, 20 FORDHAM URB. L.J. 669 (1992).

58. John J. Sullivan, *The Constitutionality of New York State's Affirmative Action Law*, 21 FORDHAM URB. L.J. 1107 (1994).

59. Renee L. Jarusinsky, *Gender Difference in Perceiving Violence and Its Implication for the VAWA's Civil Rights Remedy*, 27 FORDHAM URB. L.J. 965 (2000).

60. Conference, *IS Our Drug Policy Effective? Are there Alternatives?*, 28 FORDHAM URB. L.J. 20 (2000); Symposium, *A Perspective on "Temper in the Court": A Forum on Judicial Civility*, 23 FORDHAM URB. L.J. 709 (1996); Symposium, *Are Executions in New York Inevitable?*, 22 FORDHAM URB. L.J. 557 (1995); Symposium, *Civil Rights Law in Transition*, *supra* note 41, at 1105; Symposium, *Queer Law 1999: Current Issues in Lesbian, Gay, Bisexual and Transgendered Law*, 27 FORDHAM URB. L.J. 279 (1999); Symposium, *Forgiveness in the Law*, *supra* note 12, at 1347; Symposium, *The Seventh Annual Stein Center Symposium on Contemporary Urban Challenges: Lawyering For Poor Communities in The Twenty-First Century*, 25 FORDHAM URB. L.J. 673 (1998); Symposium, *Towards a Compassionate and Cost-Effective Drug Policy: A Forum on the Impact of Drug Policy on the Justice System and Human Rights*, 24 FORDHAM URB. L.J. 315 (1997); Symposium, *Women, Children and Domestic Violence: Current Tensions and Emerging Issues*, 27 FORDHAM URB. L.J. 565 (2000); Remarks, *From the Ground Up: Local Lessons for National Reform*, 27 FORDHAM URB. L.J. 1 (1999); Roundtable Discussion, *Law and Disorder: Is Effective Law Enforcement Inconsistent with Good Public Community Relations?*, 28 FORDHAM URB. L.J. 363 (2000).

61. See Katsoris, *supra* note 5, at 933-36.

attorneys.⁶² In Volume 23, it published *SICA: The First Twenty Years*,⁶³ which traced SICA's twenty-year history and was widely cited not only in American periodicals, but also translated into the Russian language and distributed at the International Conference on Arbitration co-sponsored by the New York Stock Exchange and the Moscow Interbank Currency Exchange in April 2000.⁶⁴ Volume 24 included *The Betrayal of McMahon*,⁶⁵ which was not only widely cited, but also was republished in its entirety by the American Arbitration Association in its book, *ADR and the Law*,⁶⁶ co-published with the *Fordham Urban Law Journal* and the *Fordham International Law Journal*. Volume 25 contained yet another highly circulated article on securities dispute resolution, *Securities Arbitration : A Clinical Experiment*,⁶⁷ which discussed the creation of a clinic at the Fordham University School of Law (at the urging of then SEC Chairman Arthur Levitt) to assist injured investors who could not obtain representation.

CONCLUSION

The tireless efforts of the *Journal's* editorial staff, faculty advisors, and members have not gone unnoticed. Over its thirty-year history, the *Journal* has been cited frequently in state and federal court decisions,⁶⁸ other law reviews, scholarly publications, periodi-

62. See *supra* note 32 and accompanying text.

63. Constantine N. Katsoris, *SICA: The First Twenty Years*, 23 FORDHAM URB. L.J. 483 (1996).

64. See *Dream Team Visits Moscow, Exchange*, Aug. 2000, at 5.

65. Constantine N. Katsoris, *The Betrayal of McMahon*, 24 FORDHAM URB. L.J. 221 (1997).

66. Constantine N. Katsoris, *The Betrayal of McMahon*, 1997 ADR & THE LAW: DEVELOPMENTS IN ADR: 1994-1996, at 24.

67. Constantine N. Katsoris, *Securities Arbitration : A Clinical Experiment*, 25 FORDHAM URB. L.J. 193 (1998).

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70. The rankings are maintained by the Washington and Lee University School of Law. For a complete list of the rankings and a description of the methodologies used, see the Washington and Lee University School of Law Law Library website, at <http://law.wlu.edu/library/research/lawrevs/mostcited.htm> (last visited Mar. 15, 2003).

Chicago v. Morales,⁷¹ the Court quoted the note, *Homelessness in a Modern Urban Setting*.⁷² Later that same year, in *Jones v. United States*,⁷³ the article *The Federal Death Penalty: History and Some Thought About the Department of Justice's Role*⁷⁴ was cited in a dissenting opinion authored by Justice Ruth Bader Ginsburg, and joined by Justice John Paul Stevens, Justice David H. Souter, and Justice Stephen G. Breyer.⁷⁵

Clearly a brief historical recap cannot fully explore the depth and diversity of the *Journal's* works, evidenced by the massive array of articles, essays, reports, symposia, book reviews, notes, and comments which it has published over the last thirty years. Accordingly attached hereto is an Appendix that provides a detailed listing of the articles, notes, comments and reports that the *Journal* has published just over the last decade.

As we enter the new millennium, many new challenges and issues must be addressed. The *Fordham Urban Law Journal* expects to remain viable and flexible so as to continue to serve the needs of a changing world and society by addressing critical issues in a frank and articulate manner. Congratulations to the ULJ on its *Thirtieth Anniversary* and—as stated at its *Twentieth Anniversary*—“*may the future reflect the excellence of its past.*”⁷⁶

71. 527 U.S. 41 (1999).

72. *Id.* at 54 n.20 (quoting Mark Malone, Note, *Homelessness in a Modern Urban Setting*, 10 FORDHAM URB. L.J. 749, 754 n.17).

73. 527 U.S. 373 (1999).

74. Rory K. Little, *The Federal Death Penalty: History and Some Thought About the Department of Justice's Role*, 26 FORDHAM URB. L.J. 347 (1999).

75. *Jones*, 527 U.S. at 407 n.3 (Ginsburg, J., dissenting) (citing Little, *supra* note 74, at 349 n.5, 372-80).

76. Katsoris, *supra* note 5, at 942 (emphasis added).

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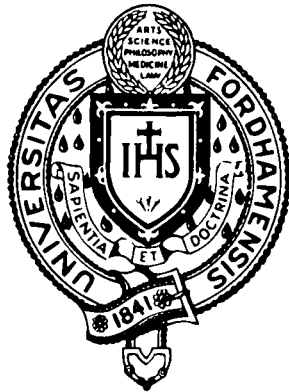
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THE FORDHAM URBAN LAW JOURNAL: TWENTY YEARS OF PROGRESS

Constantine N. Katsoris*

I. Introduction

Fordham Law School was founded in 1905 and originally located in Collins Hall on the main campus in the suburban setting at Rose Hill.¹ Despite its pristine setting, it soon became apparent that a location closer to the courts would be more practical. Thus, during its first academic year, the school moved to downtown Manhattan where, after an interim move,² it settled in the landmark Woolworth Building.³ It remained there until 1943 when it relocated again just a few blocks north to 302 Broadway⁴ — conveniently nestled among the Financial District of Wall Street, the Municipal Government at City Hall, and the Federal and State Courts at Foley Square.⁵ It remained at this location until 1961,⁶ when the school moved uptown to its present location at New York's historic Lincoln Center for the Performing Arts.⁷

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1. The Campus at Rose Hill consists of approximately 85 acres and is presently bordered by the world famous Bronx Botanical Gardens on the West and the Bronx Zoo on the Northeast. George James, *For the Bronx, A New Image is a Tough Sell*, N.Y. TIMES, June 10, 1986, at B1.

2. In 1906 the Law School moved to 42 Broadway, and in 1908 moved to 20 Vesey Street — both in the downtown area of Manhattan. See BIBLIO JURIS, INC., A HISTORY (OF) FORDHAM UNIVERSITY SCHOOL OF LAW, at 2-4 [hereinafter LAW SCHOOL HISTORY].

3. *Id.* at 6. The Woolworth Building was then the tallest building in the world, and was granted landmark status on April 12, 1983. *News Summary*, N.Y. TIMES, Apr. 13, 1983, at B1.

4. This location at 302 Broadway became the home not only of the Law School, but also the downtown divisions of the Schools of Business, Education, and Social Service. See Sidney C. Schaer, A. Daniel Fusaro, *Chief County Clerk*, NEWSDAY, Feb. 10, 1988, at 41.

5. The building has since been demolished to make way for a new Federal complex.

6. See LAW SCHOOL HISTORY, *supra* note 2, at 16.

7. Lincoln Center for the Performing Arts consists of several square blocks in midtown Manhattan and houses such world famous institutions as the Metropolitan Opera, Avery Fisher Hall, the New York State Theater and Julliard School of Music. See, Ted

The first legal publication at the law school, the *Fordham Law Review*, was established in 1914, only to be discontinued three years later with the onset of World War I.⁸ In 1935, however, in the midst of the Great Depression, the *Fordham Law Review* was re-established, and has published with distinction ever since.

After the move to the cultural hub at Lincoln Center, the problems associated with our *urban*⁹ areas began to accelerate.¹⁰ It became apparent that a closer focus had to be directed specifically at the urban problems of the nation, with particular emphasis on the affairs of its then largest city and state — New York.¹¹ Thus, the *Fordham Urban Law Journal* (*ULJ* or *Journal*) published its first issue in 1972, exactly twenty years ago.¹²

Kenney, *If You're Thinking of Living in Lincoln Square*, N.Y. TIMES, August 12, 1990, § 10, at 5. Indeed, one of the major figures in the creation of Lincoln Center for the Performing Arts was Rev. Laurence J. McGinley, S.J., president of Fordham University from 1949 to 1963. L.J. McGinley, *Fordham Ex-President, Dies at 86*, N.Y. Times, Aug. 18, 1992, at D19. It was he who brought Fordham to Lincoln Center, whose campus principally houses the graduate schools of the University, with Rose Hill predominantly remaining the host of the undergraduate divisions. As he then explained the relationship between the two campuses: "[o]urs is a double educational tradition . . . Fordham at Rose Hill will continue to have a campus of elm-lined paths and ivied walls and ancient heritage; Fordham at Lincoln Square will continue to provide the daily meeting and mingling of town and gown." *Id.* Indeed, at the 25th Anniversary celebration of the law school at Lincoln Center, Father McGinley reflected that the move to Lincoln Center "was good for Fordham, and good for New York, that we should build here, and set our cornerstone in the heart of this tight, little island." Rev. Laurence McGinley, S.J., Address at the 25th Anniversary of Fordham University Law School at Lincoln Center, Dean's Day (1986).

The Fordham campus at Lincoln Center consists of two square blocks, and the first building constructed there was the Law School building at 140 W. 62nd Street. This author began his teaching career at the Lincoln Center location in 1964. Shortly thereafter a twelve story building was also erected immediately south of the law school to house the Graduate Schools of Business, Social Services, Education, and various undergraduate schools. In addition, construction began in 1991 on a 20 story dormitory which will house approximately 850 students of the various Fordham graduate and undergraduate schools located at Lincoln Center.

8. See LAW SCHOOL HISTORY, *supra* note 2, at 6.

9. The term "urban" has been defined as "relating to, characteristic of, or taking place in a city . . ." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2520 (1986).

10. See John Herbers, *Panel Sees Crime Turning The Cities Into Armed Camps*, N.Y. TIMES, Nov. 24, 1969, at A1; John Herbers, *Backers of More Urban Aid Named Model Cities Head*, N.Y. TIMES, Jan. 24, 1969, at A1; *Who Speaks for the Cities?*, NEWSWEEK Apr. 7, 1969, at 48; David Danzig and John Feild, *The Betrayal of the American City*, 45 COMMENTARY 52 (June 1968).

11. As the Honorable Joseph M. McLaughlin (Dean, Fordham Law School 1971-1981) wrote in the opening pages of the FORDHAM URBAN LAW JOURNAL's first volume in 1972, "we cannot ignore the crisis which has beset our cities." Appreciation, 1 FORDHAM URB. L.J. (1972).

12. Volume 1 of the *ULJ* was dedicated to the Honorable William Hughes Mulligan

In documenting the *Journal's* success in addressing urban issues, it is not easy to summarize over *four hundred* articles, reports, notes and comments,¹³ spanning over *fifteen thousand* pages,¹⁴ which were prepared by *twenty* different editorial staffs.¹⁵ Nevertheless, this article will make the attempt, first from a chronological historical portrayal,¹⁶ and then from the perspective of the *Journal's* impact upon specific areas of the law.¹⁷

II. Historical Development

The first article published by the *Journal*, written by Attorney General Louis J. Lefkowitz,¹⁸ discussed the unique urban environmental problems of New York City's Jamaica Bay. It focused on and offered suggestions regarding the dilemma of having a large body of water which is polluted by its urban neighbors, yet also serves as an important "breeding ground for waterfowl, fish and shellfish, [and] a waystation for migratory birds."¹⁹ Other urban topics covered in that ini-

(Dean, Fordham Law School 1956-71) who "enthusiastically supported and assisted in the organization and development of the law school's second student legal periodical, the FORDHAM URBAN LAW JOURNAL." Dedication, 1 FORDHAM URB. L.J. (1972). The initial funding for the *Journal* came from Louis Stein, Class of 1926. Thereafter, additional support was received from the Fordham Law School Alumni Association's Annual Fund. Since then, the students at Fordham Law School, with the assistance of the Alumni, commenced the publication of three additional Fordham journals, namely: The FORDHAM INTERNATIONAL LAW JOURNAL; The FORDHAM ENVIRONMENTAL LAW REPORT; and the FORDHAM ENTERTAINMENT, MEDIA AND INTELLECTUAL PROPERTY LAW FORUM.

13. See Appendix, *infra*.

14. See *infra* note 66.

15. In addition to 20 different staffs (volume 1 took two years to publish and thus had two different editorial boards), the ULJ has had the following Faculty Advisors: Professor Michael R. Lanzarone; Professor Charles N. Whelan; Dean Gerald T. McLaughlin; and, Professor Daniel J. Capra.

16. See *infra* notes 18-67 and accompanying text.

17. See *infra* notes 68-196 and accompanying text.

18. Louis J. Lefkowitz, a graduate of Fordham Law School in 1925, was the Attorney General of the State of New York from 1957 to 1978, serving during the administrations of Governors Harriman, Rockefeller, Wilson, and Carey. As New York's Attorney General for over 20 years, he became one of the first state attorney generals to take an active role in civil rights, environmental protection and the prevention of consumer fraud. Moreover, in 1962 he became the first Attorney General from New York to be appointed president of the National Association of Attorneys General. See Mary Ann Giordano, *Tell It to Louis Lefkowitz*, MANHATTAN LAWYER, Jan. 1988, at 12.

In his honor, the ULJ commenced the annual presentation of the *Louis J. Lefkowitz Award* to the following *honorable* recipients: Archibald R. Murray - 1982; John F. Keenan - 1983; Robert Abrams - 1984; Robert M. Hayes - 1985; Geraldine A. Ferraro - 1986; Stanley Fink - 1987; Andrew J. Maloney - 1988; Ross Sandler - 1989; Frederick A.O. Schwarz - 1990; John D. Feerick - 1991; Charles L. Briant - 1992.

19. Louis J. Lefkowitz, *Jamaica Bay: An Urban Marshland In Transition*, 1 FORD-

tial volume included: the criminal responsibility of drug addicts; the dangers arising from nuclear power; noise pollution; tenant remedies for harassment; and, urban crime. Unfortunately, many of these urban problems of the early 1970s still remain with us today.²⁰

Volume 2 contained a report by the New York City Board of Correction entitled *Pre-Sentence Report: Utility or Futility?*,²¹ which focused on delays between a finding or plea of guilty and the sentencing of criminal defendants. The next few volumes continued to expand the coverage of urban issues, reporting on such areas as: fiscal crises,²² affirmative action,²³ landmark preservation,²⁴ religious discrimination in employment,²⁵ as well as ethics in the legal community.²⁶

Volume 5 contained several significant pieces. One was a controversial article by David I. Caplan on the constitutional right to bear arms.²⁷ In light of the recent riots in Los Angeles,²⁸ this article, albeit

HAM URB. L.J. 1 (1972). The waters of Jamaica Bay, often referred to as a "tarnished jewel," absorb sewage from city treatment plants and jet fuel from spills at Kennedy Airport, and its air is suffused with smoke from jets entering and taking off from the airport. *Id.* Nevertheless, this body of water - eight miles long and four miles wide - sustains and nourishes a wide variety of wildlife. It serves as a feeding station on the Atlantic Flyway, the main north-south route of migratory birds in this hemisphere. *Id.* at 3.

20. See, e.g., Peter Applebome, *From Riots of the 60's to Riots of the 90's, a Frustrating Search to Heal a Nation*, N.Y. TIMES, May 8, 1992, at A19; Chuck Freadhoff, *What Caused the Riots in LA?*, INVESTOR'S BUSINESS DAILY, May 4, 1992, at 1; Betsey Carpenter & Tim Zimmermann, *Don't Blame it on Rio*, U.S. NEWS & WORLD REPORT, May 11, 1992, at 56; Sharon Begley et al., *Show Me The Way to Rio*, NEWSWEEK, May 11, 1992, at 59; Jane Birnbaum et al., *The Economic Crisis of Urban America*, BUSINESS WEEK, May 18, 1992, at 38; *America's Cities*, THE ECONOMIST, May 9, 1992, at 21; Chris Oliver, *Feds Slaughter JFK Seagulls*, N.Y. POST, May 21, 1992, at 5. Indeed, many of these problems are prevalent worldwide. See Edward Buscall, *Cities Turn Tide of Urban Decline*, THE EUROPEAN, June 11-14, 1992, at 4.

21. New York City Board of Correction, *Pre-Sentence Reports: Utility or Futility?*, 2 FORDHAM URB. L.J. 27 (1973).

22. See John V. Connorton, *The Fiscal Crisis of New York City Voluntary Hospitals*, 2 FORDHAM URB. L.J. 459 (1974).

23. See Katherine M. Lordi and Paul H. Schietroma, Comment, *The Infirmities of Affirmative Action: The New York City Plan*, 2 FORDHAM URB. L.J. 305 (1974).

24. See Mary Spearing, Note, *Landmark Preservation: The Problem of the Tax Exempt Owner*, 3 FORDHAM URB. L.J. 123 (1974).

25. See John D. Dadakis & Thomas M. Russo, Note, *Religious Discrimination in Employment: The 1972 Amendment - A Perspective*, 3 FORDHAM URB. L.J. 327 (1975).

26. See William R. Meagher, *A Critique of Lawyers' Ethics in an Adversary System*, 4 FORDHAM URB. L.J. 289 (1976) (reviewing MONROE H. FREEDMAN, *LAWYER'S ETHICS IN AN ADVERSARY SYSTEM* (1975)).

27. David I. Caplan, *Restoring the Balance: The Second Amendment Revisited*, 5 FORDHAM URB. L.J. 31 (1976).

28. See *supra* note 20; see also James M. Perry, *Arms, and Clashes Over the Right to Bear Them, Turn California Politics Into a Heated Gunfight*, WALL ST. J., May 26, 1992, at A18.

controversial, still appears to be timely. Indeed, over five thousand reprints were ordered in 1977 by parties interested in this area of the law. Another piece, written by Kenneth Bond, concerned itself with the then newly enacted municipal bankruptcy provisions.²⁹ Since this article was published during the time of New York City's 1976-1977 fiscal crisis,³⁰ numerous extra copies were distributed.

Volume 6 was significant in that it reflected an expansion in the number of *ULJ* staff members, resulting in a marked increase in the publication of student comments and notes. Moreover, this volume further broadened the *Journal's* coverage of federal and national issues generally, rather than principally dwelling upon New York related problems.

This expanded coverage continued in volumes 7 through 14,³¹ resulting in articles covering: First Amendment issues,³² the right to privacy,³³ medical malpractice insurance,³⁴ the energy crisis,³⁵ tax exemptions,³⁶ access to federal courts in civil rights cases,³⁷ zoning,³⁸

29. Kenneth W. Bond, *Municipal Bankruptcy Under the 1976 Amendments to Chapter IX of the Bankruptcy Act*, 5 FORDHAM URB. L.J. 1 (1976).

30. See Constantine N. Katsoris, *City's Death Tax and Its Possible Effects*, N.Y. L.J., Jan. 29, 1976, at 1.

31. As Acting Dean and Professor of Law, Joseph M. Perillo wrote in the opening pages of *ULJ* volume 10, book IV: "[t]he Urban Law Journal is performing a vital service by applying the research and analytical skills of the legal profession to the problems that plague urban areas. It publishes articles and comments by scholars, practitioners and students which focus on law as it affects the cities and their inhabitants." Joseph M. Perillo, *The Fordham Urban Law Journal: A Decade of Legal Scholarship and Community Service*, 10 FORDHAM URB. L.J. xi (1982).

32. See, e.g., Mark S. Nadel, *A Unified Theory of the First Amendment: Divorcing the Medium from the Message*, 11 FORDHAM URB. L.J. 163 (1982); Stephen M. Watson, Note, *First Amendment Challenges to Landmark Preservation Statutes*, 11 FORDHAM URB. L.J. 115 (1982).

33. See, e.g., Carole M. Cleaver, Note, *Privacy Rights in Medical Records*, 13 FORDHAM URB. L.J. 165 (1985); Gretta J. Heaney, Note, *The Constitutional Right of Informational Privacy: Does It Protect Children Suffering From Aids?*, 14 FORDHAM URB. L.J. 927 (1986); Frederick R. Kessler, Note, *A Common Law for the Statutory Era: The Right of Publicity and New York's Right of Privacy Statute*, 15 FORDHAM URB. L.J. 951 (1987).

34. See, e.g., Mark Monaco, Note, *New York's Medical Malpractice Insurance Crises - A New Direction for Reform*, 14 FORDHAM URB. L.J. 773 (1986), cited in *In re Medical Malpractice Ins. Assoc. v. Superintendent of Ins.*, 533 N.E.2d 1030, 1031 (N.Y. 1988), cert. denied, 490 U.S. 1080 (1989).

35. See, e.g., Charles M. Pratt, *Cogeneration: A Successful Response to the Energy Crisis?*, 9 FORDHAM URB. L.J. 483 (1981).

36. See, e.g., Deborah A. Konopko, Note, *Targeting Tax Dollars More Efficiently: Proposed Modifications to the 421-a Real Property Tax Exemption*, 15 FORDHAM URB. L.J. 1077 (1987); George A. King, Note, *Tax Exempt Financing of Health Care Facilities as a Component of the Market Approach to Health Care Cost Containment*, 11 FORDHAM URB. L.J. 603 (1983).

37. See, e.g., Irma B. Ascher, Comment, *Restrictions on Access to the Federal Courts*

juvenile offenders,³⁹ homelessness,⁴⁰ securities disputes,⁴¹ minorities in employment,⁴² due process,⁴³ solid waste,⁴⁴ the New York "pothole law,"⁴⁵ anti-trust,⁴⁶ torts and product liability,⁴⁷ confidentiality,⁴⁸ the death penalty,⁴⁹ executing youthful offenders,⁵⁰ and a topical note on the AIDS virus.⁵¹ Furthermore, Senator Orrin G. Hatch contributed an article in 1979 entitled, *Should the Capital Vote in Congress? A Critical Analysis of the D.C. Representation Amendment*.⁵²

in *Civil Rights Actions: The Role of Abstention and Res Judicata*, 6 FORDHAM URB. L.J. 481 (1978), cited in *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982).

38. See, e.g., Terence Kennedy, Note, *New York City Zoning Resolution Section 12-10: A Third Phase in the Evolution of Airspace Law*, 11 FORDHAM URB. L.J. 1039 (1983), cited in *Wing Ming Properties, Ltd. v. Mott Operating Corp.*, 561 N.Y.S.2d 337 (1990).

39. See, e.g., Carol Bombardi, Note, *Juvenile Detention Hearings: A Proposed Model Provision to Limit Detention During the Preadjudicatory Stage*, 12 FORDHAM URB. L.J. 285 (1984).

40. See, e.g., Mark Malone, Note, *Homelessness in a Modern Urban Setting*, 10 FORDHAM URB. L.J. 749 (1982); Neil V. McKittrick, *The Homeless: Judicial Intervention on Behalf of a Politically Powerless Group*, 16 FORDHAM URB. L.J. 389 (1988).

41. See, e.g., Douglas E. Abrams, *The Scope of Liability Under Section 12 of the Securities Act of 1933: "Participation" and the Pertinent Legislative Materials*, 15 FORDHAM URB. L.J. 877 (1987), cited in *Pinter v. Dahl*, 486 U.S. 622 (1988).

42. See, e.g., Terry S. Sterling, Note, *Court-Ordered Hiring Programs Under Title VII: The Effects on Absentee Minorities*, 10 FORDHAM URB. L.J. 147 (1981); Ellen Zweig, Note, *Challenges to Employment Testing Under Title VII: Creating "Built in Headwinds" for the Civil Service Employer*, 12 FORDHAM URB. L.J. 749 (1984).

43. See, e.g., Peter J. O'Connor, *Entrapment Versus Due Process: A Solution to the Problem of the Criminal Conviction Obtained by Law Enforcement Misconduct*, 7 FORDHAM URB. L.J. 35 (1978).

44. See, e.g., Donna R. Lanza, Comment, *Municipal Solid Waste Regulation: An Ineffective Solution to a National Problem*, 10 FORDHAM URB. L.J. 215 (1982).

45. See, e.g., Terri J. Frank, Note, *New York City's Pothole Law: In Need of Repair*, 10 FORDHAM URB. L.J. 323 (1982).

46. See, e.g., Timothy J. Brennan, *Local Government Action and Antitrust Policy: An Economic Analysis*, 12 FORDHAM URB. L.J. 405 (1984); Brian J. McCarthy, Note, *Developing A Consumer Right to Invoke the Boycott Exception to the Insurance Company Exemption From Federal Antitrust Laws*, 6 FORDHAM URB. L.J. 353 (1978).

47. See, e.g., Pamela A. Keating, Note, *Municipal Liability for Requiring Unfit Police Officers to Carry Guns*, 11 FORDHAM URB. L.J. 1001 (1983); Robert S. Ondrovic, Note, *Municipal Tort Liability for Criminal Attacks Against Passengers on Mass Transportation*, 12 FORDHAM URB. L.J. 325 (1984).

48. See, e.g., Abraham Abramovsky, *A Case for Increased Confidentiality*, 13 FORDHAM URB. L.J. 11 (1985).

49. See, e.g., Andrea Gallo, Note, *Death After Life: The Future of New York's Mandatory Death Penalty for Murders Committed by Life-Term Prisoners*, 13 FORDHAM URB. L.J. 597 (1985).

50. See, e.g., John M. Tyd, Note, *Constitutional Challenges to New York's Youthful Offender Statute*, 5 FORDHAM URB. L.J. 475 (1977); Luke M. Charde, Jr., Comment, *The Juvenile Offender-Where Can We Send Him?*, 2 FORDHAM URB. L.J. 245 (1974).

51. See, e.g., Gretta J. Heaney, Note, *The Constitutional Right of Informational Privacy: Does it Protect Children Suffering from Aids?*, 14 FORDHAM URB. L.J. 927 (1986).

52. Orrin G. Hatch, *Should the Capital Vote in Congress? A Critical Analysis of the*

Volume 15 saw a further development: the publication of significant public reports. That volume included the *Report of the New York Task Force on Women in the Courts*,⁵³ which set out the problems faced by women in the court system, and included a foreword by the Honorable Judith S. Kaye,⁵⁴ remarks by the Honorable Sol Wachtler,⁵⁵ and a message from the Dean of Fordham Law School, John D. Feerick.⁵⁶ This Report was widely circulated in the legal community, in large measure because of its ready availability through the *ULJ*. Because of its significance and timeliness, approximately ten thousand copies of this Report were requested. Moreover, as a follow-up, volume 19 recently published the *Five Year Report of the New York Judicial Committee on Women in the Courts*.⁵⁷

Volume 18 contained several additional significant reports: the two reports of the New York State Commission on Government Integrity⁵⁸ (collectively referred to as *Feerick Commission* or *Feerick Report*) and the New York State Bar Association's *Report of Special Committee to Consider Sanctions for Frivolous Litigation in New York State Courts*⁵⁹ (*Frivolous Litigation Report*).

The reception of the *Feerick Report* by the legal community was enthusiastic. It documented a number of political abuses, exposed weaknesses in the law that created opportunities for corruption, and laid out a detailed agenda for raising governmental ethical standards in New York State. The Report was widely disseminated, not only in New York, but throughout the United States, and has been frequently quoted by the media in its commentaries on governmental ethics.⁶⁰ In

Proposed D.C. Representation Amendment, 7 FORDHAM URB. L.J. 479 (1979). Orrin G. Hatch has been a United States Senator from Utah since 1976.

53. 15 FORDHAM URB. L.J. 11 (1986).

54. Hon. Judith S. Kaye, *Foreward* to REPORT OF NEW YORK TASK FORCE ON WOMEN IN THE COURTS, 15 FORDHAM URB. L.J. 1 (1986). Judge Judith S. Kaye is a member of the New York Court of Appeals.

55. Hon. Sol Wachtler, *Remarks* to REPORT OF NEW YORK TASK FORCE ON WOMEN IN THE COURTS, 15 FORDHAM URB. L.J. 3 (1986). Judge Sol Wachtler is the Chief Judge on the New York Court of Appeals.

56. John D. Feerick, *Message* to REPORT OF NEW YORK TASK FORCE ON WOMEN IN THE COURTS, 15 FORDHAM URB. L.J. 7 (1986).

57. 19 FORDHAM URB. L.J. 313 (1992).

58. New York State Commission on Government Integrity, *RESTORING THE PUBLIC TRUST: A BLUEPRINT FOR GOVERNMENT INTEGRITY*, 18 FORDHAM URB. L.J. 173 (1990), and *INTEGRITY AND ETHICAL STANDARDS IN NEW YORK STATE GOVERNMENT: FINAL REPORT TO THE GOVERNOR*, 18 FORDHAM URB. L.J. 251 (1990).

59. New York State Bar Association, *REPORT OF SPECIAL COMMITTEE TO CONSIDER SANCTIONS FOR FRIVOLOUS LITIGATION IN NEW YORK STATE COURTS* MARCH 20, 1990, 18 FORDHAM URB. L.J. 3 (1990).

60. See *An Ethics Panel Ends Its Work, and It's Angry*, N.Y. TIMES, Sept. 23, 1990, at 22; Ned Kilkelly, *Corruption Panel Slams Lawmakers in Final Report*, UPI, Sept. 18,

fact, many of the *Feerick Commission's* recommendations have already been enacted into legislation.⁶¹

The *Frivolous Litigation Report* was prefaced with an introduction by the Honorable Hugh R. Jones, the chair of the Committee.⁶² The Report set forth several recommendations including a proposed sanctions rule. Thousands of lawyers and judges were solicited for their views on this topic, and the recommendations reflect the Committee's consideration of "the basic principles which underlie Rule 11 of the Federal Rules of Civil Procedure."⁶³

Recently, volume 19 published the *Report of the New York State Judicial Commission on Minorities*.⁶⁴ The New York State Judicial Commission on Minorities was appointed by Chief Judge Sol Wachtler, and its Report was issued after more than three years of studying the problems of racial bias in the state's judicial system.⁶⁵

As for physical growth, the *Journal's* first volume consisted of 546 pages, increasing to a peak of 1116 in volume 11.⁶⁶ Its present circulation has grown to approximately 3,000 copies per volume, including 720 domestic and 21 foreign subscribers. Moreover, since 1983, the bulk of recent *ULJ* articles and notes are available on Westlaw.⁶⁷

1990, available in LEXIS, NEXIS library, UPI file; Robert A. Jordan, *Shopping for Low Turnout*, BOSTON GLOBE, Aug. 18, 1990, at 25; *Heat on Campaign Reform*, N.Y. TIMES, Jan. 23, 1988, at 26.

61. A large number of the Commission's recommendations have been incorporated into the New York City Campaign Finance Law and the uniform guidelines issued by the New York City Policy Procurement Board. Moreover, several New York municipalities have adopted major parts of the Commission's proposed municipal ethics code. Most recently in 1992, the New York State Legislature and Governor agreed to changes that would set stricter limits on contributions that individuals and political action committees may give to state and citywide candidates and eliminate many technical requirements frequently used to keep candidates off the ballot. See Sarah Lyall, *Voting to Untangle Election Law, Albany Backs New Spending Caps*, N.Y. TIMES, May 4, 1992, at A1.

62. Hugh R. Jones, *Introduction to REPORT OF SPECIAL COMMITTEE TO CONSIDER SANCTIONS FOR FRIVOLOUS LITIGATION IN NEW YORK STATE COURTS*, 18 FORDHAM URB. L.J. 1 (1990). Judge Hugh R. Jones was formerly a member of the New York Court of Appeals.

63. *Id.*

64. The New York State Judicial Commission on Minorities, *REPORT OF THE NEW YORK STATE JUDICIAL COMMISSION ON MINORITIES*, 19 FORDHAM URB. L.J. 181 (1992) [hereinafter MINORITIES REPORT].

65. Sol Wachtler, *Introduction to MINORITIES REPORT*, 19 FORDHAM URB. L.J. 175 (1992).

66. *ULJ* pages per volume are as follows (volume/pages): 1/546; 2/684; 3/778; 4/654; 5/624; 6/710; 7/703; 8/963; 9/1114; 10/781; 11/1116; 12/929; 13/972; 14/1030; 15/1110; 16/533; 17/526; 18/723; 19/1046.

67. West Publishing, 1992.

III. Special Impact Articles

To truly show the depth and breadth of the *Journal's* articles, it is also necessary, in addition to a historical portrayal,⁶⁸ to examine them from the perspective of their effect upon designated areas of the law. Indeed, this impact has not gone unnoticed, as indicated by the frequent listing of the *Journal's* articles in the "Worth Reading" column of the *National Law Journal*,⁶⁹ and the number of times the articles have been cited in judicial opinions, publications and journals.⁷⁰

A. Criminal Law

The *Journal* has published over a dozen articles, comments or notes dealing with criminal law. Moreover, the New York Court of Appeals has cited several of these pieces,⁷¹ namely: a case note in volume 5 discussing the inability of custodial criminals under indictment to waive their right to counsel without the presence of an attorney⁷² and another case note which discussed the issue of multiple jury joint trials.⁷³

A recent student note proposed an "aggravated child abuse" statute which would recognize such child abuse as an underlying felony to support a felony murder charge, along with a similar amendment to

68. See *supra* notes 12-67 and accompanying text.

69. The NAT'L L.J. issue (by date) and *ULJ* article referred therein (volume and page) are as follows:

3/2/92 (18 *ULJ* 573); 9/17/90 (17 *ULJ* 383); 6/11/90 (17 *ULJ* 303); 3/5/90 (17 *ULJ* 217); 11/27/89 (16 *ULJ* 615); 11/27/89 (16 *ULJ* 647); 11/27/89 (16 *ULJ* 703); 3/27/89 (16 *ULJ* 467); 3/13/89 (16 *ULJ* 263); 3/13/89 (16 *ULJ* 295); 2/27/89 (16 *ULJ* 487); 8/29/88 (16 *ULJ* 127); 8/1/88 (16 *ULJ* 127); 6/20/88 (15 *ULJ* 951); 6/20/88 (15 *ULJ* 1077); 6/20/88 (15 *ULJ* 1049); 2/29/88 (15 *ULJ* 767); 10/26/87 (15 *ULJ* 289); 10/19/87 (15 *ULJ* 533); 10/12/87 (15 *ULJ* 359); 7/13/87 (15 *ULJ* 199); 7/13/87 (14 *ULJ* 1011); 7/6/87 (14 *ULJ* 927); 6/29/87 (14 *ULJ* 927); 2/2/87 (14 *ULJ* 685); 1/26/87 (14 *ULJ* 773); 1/19/87 (14 *ULJ* 773); 10/6/86 (14 *ULJ* 477); 6/2/86 (14 *ULJ* 115); 5/19/86 (14 *ULJ* 259); 5/12/86 (14 *ULJ* 259); 1/27/86 (13 *ULJ* 869); 1/20/86 (13 *ULJ* 869); 11/4/85 (13 *ULJ* 553); 10/28/85 (13 *ULJ* 443); 10/28/85 (13 *ULJ* 373); 10/28/85 (13 *ULJ* 395); 10/21/85 (13 *ULJ* 373); 1/14/85 (12 *ULJ* 807); 1/14/85 (12 *ULJ* 807); 4/18/83 (11 *ULJ* 51); 4/18/83 (11 *ULJ* 139); 4/11/83 (11 *ULJ* 115); 4/4/83 (11 *ULJ* 85); 1/31/83 (10 *ULJ* 595); 1/24/83 (10 *ULJ* 595); 1/17/83 (10 *ULJ* 541).

70. See *infra* notes 197-200 and accompanying text.

71. *People v. Ricardo B.*, 73 N.Y.2d 228, 234 (1989) (citing Case Note, *Multiple Jury Joint Trial — On the Joint Trial of Two Defendants, the Empanelling of Two Juries Simultaneously is Permissible*, 2 *FORDHAM URB. L.J.* 407 (1973)); *People v. Cunningham*, 49 N.Y.2d 203, 208 (1979) (citing Stuart J. Feld, Case Note, *Right to Counsel — Custodial Criminal Defendant May Not Waive Right to Counsel in the Absence of His Court Appointed Attorney*, 5 *FORDHAM URB. L.J.* 401 (1977)); *People v. Settles*, 46 N.Y.2d 154, 163 (1978).

72. *Right to Counsel*, *supra* note 71.

73. *Multiple Jury*, *supra* note 71.

the current felony murder statute.⁷⁴ This suggested legislation addresses the difficulty of obtaining a conviction for intentional homicide and depraved indifference to human life where child abuse is the underlying predicate felony.⁷⁵ It would simplify the task of the jury by attributing the requisite intent of a murder conviction to one who commits a homicide during the commission of the underlying felony of aggravated child abuse.⁷⁶ In addition, the proposed amendment would serve to deter abuse by parents, protect the child from harm, and satisfy society's outrage over the senseless beating of a child.⁷⁷

Another note argued that DNA fingerprinting is an invaluable tool for prosecutors and defense attorneys, creating the necessity of establishing a national database of DNA fingerprints.⁷⁸ It concluded that the DNA test is a sensitive, accurate and accepted method of identification that could revolutionize criminal investigations, without unnecessarily invading individual privacy.⁷⁹

Also noteworthy was the publication of a colloquium on Model Rule 1.6 of the American Bar Association's 1983 Model Rules of Professional Conduct, which debated the issue of confidentiality of the *intended* crimes of clients versus the public's generally skeptical view of legal ethics.⁸⁰ One of the articles in the colloquium contends that confidentiality must be guaranteed in all but the most drastic circumstances, *i.e.*, planned murder and mayhem.⁸¹ Another article urges that a balance between confidentiality and other values, such as preserving the integrity of the legal system, is the better approach because it permits lawyers to divulge information about a greater range

74. Barry Bendetowies, Note, *Felony Murder and Child Abuse: A Proposal for the New York Legislature*, 18 FORDHAM URB. L.J. 383 (1991). This note discusses the Joel Steinberg trial, which received great notoriety. *Id.* at 404.

75. Bendetowies, *supra* note 74, at 384.

76. Bendetowies, *supra* note 74, at 405.

77. *Id.*

78. JoAnn Marie Longobardi, Note, *DNA Fingerprinting and the Need For a National Data Base*, 17 FORDHAM URB. L.J. 323 (1989). See, S. Raab, *Cuomo Seeks Genetic Data of Offenders*, N.Y. TIMES, May 10, 1992, § 1 at 27. DNA, which stands for deoxyribonucleic acid, is "the basic hereditary material, . . . [which] determines specific traits in organisms by guiding the production of specific polypeptide chains, one or more of which interact to form a protein molecule." J. BAKER & G. ALLEN, *THE STUDY OF BIOLOGY*, 441-42 (4th ed. 1982).

79. Longobardi, *supra* note 78, at 357. See also Cerisse Anderson, *DNA Tests Ordered In Paternity Lawsuit*, N.Y. L.J., July 21, 1992, at 1.

80. *The Lawyer's Dilemma Over Model Rule 1.6 and Client Confidentiality — Conflicting Duties to Clients and Society*, 13 FORDHAM URB. L.J. 1 (1984).

81. Abraham Abramovsky, *A Case for Increased Confidentiality*, 13 FORDHAM URB. L.J. 11 (1984).

of criminal activities than is permitted under Rule 1.6.⁸²

Two recent notes examined issues of the implementation of suspect procedures against criminal defendants.⁸³ One attempts to establish an equitable standard regarding immunity for pre-trial testimony of police officers. It takes into account the truth-seeking function of the judicial process, while also considering the lack of procedural safeguards afforded the criminal defendant at *ex parte* pre-trial proceedings.⁸⁴ The other note attempts to provide for greater consistency and clarity in the application of the good-faith exception⁸⁵ where warrants fail to describe with particularity the places to be searched and the things to be seized.

A timely article appears in the current issue which calls for alternative approaches in the fight against bias or hate crimes.⁸⁶ It discusses existing and proposed legislation to increase the penalties for bias-related attacks. The article concludes that legislative efforts alone are insufficient and that further, more diverse efforts such as grass-roots, community-wide programs and educational seminars aimed at elementary schoolchildren are necessary to strike at the underlying causes of bias crime.

B. Employment Law

Volume 10 included a leading article entitled, *The Effect of the Employment-At-Will Rule on Employee Rights to Job Security and Fringe Benefits*.⁸⁷ That article has been cited in landmark decisions on the employment-at-will rule in New York, Minnesota and Arkansas, as well as by other federal and state courts.⁸⁸ Moreover, it has also been

82. Deborah Abramovsky, *A Case for Increased Disclosure*, 13 FORDHAM URB. L.J. 43 (1984).

83. Jack Kaufman, Note, *Section 1983: Absolute Immunity For Pretrial Police Testimony*, 16 FORDHAM URB. L.J. 647 (1988); Martha Applebaum, Note, "Wrong But Reasonable": *The Fourth Amendment Particularity Requirement After United States v. Leon*, 16 FORDHAM URB. L.J. 577 (1988).

84. Kaufman, *supra* note 83, at 702.

85. Under this, "[t]he exclusionary rule does not apply when law enforcement officers have acted in objective reasonable reliance on a warrant subsequently found to be invalid." Applebaum, *supra* note 83, at 578.

86. Abraham Abramovsky, *Bias Crime: A Call for Alternative Responses*, 19 FORDHAM URB. L.J. 875 (1992).

87. Joseph DeGiuseppe, Jr., *The Effect of the Employment-At-Will Rule on Employee Rights to Job Security and Fringe Benefits*, 10 FORDHAM URB. L.J. 1 (1981).

88. See *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894, 896 n.4 (3d Cir. 1983); *Boniuk v. New York Medical College*, 535 F. Supp. 1353, 1356 (S.D.N.Y. 1982); *Crain Industries, Inc. v. Cass*, 810 S.W.2d 910, 914 (Ark. 1991); *Pine River State Bank v. Mettille*, 333 N.W.2d 622, 629 (Minn. 1983); *Murphy v. Am. Home Prod. Corp.*, 448 N.E.2d 86, 94 n.4 (N.Y. 1983); *Weiner v. McGraw-Hill, Inc.*, 443 N.E.2d 441, 444 n.4 (N.Y. 1982); *Helle v. Landmark, Inc.*, 472 N.E.2d 765, 775 n.10 (Ohio Ct. App. 1984); *State Ex Rel.*

widely cited by twenty-five prestigious law journals, treatises and other legal publications.⁸⁹

In addition, the Ninth and Tenth Circuits⁹⁰ referred to a *ULJ* note criticizing the Multiemployer Pension Plan Amendments Act of 1980. That note, *MPPAA Withdrawal Liability Assessment: Letting the Fox Guard the Henhouse*,⁹¹ also proposes remedial legislation which would cure the problems associated with the imposition of unreasonable liability assessments upon the withdrawal from such plans.

Moreover, a note in the current issue examines the constructive discharge rule in Title VII denial of promotion cases in light of recent lower court decisions.⁹² It argues that in determining whether an employee has been constructively discharged as a result of the employer's discriminatory employment conditions, the court should consider whether the employee's reasonable expectations of career advancement have been frustrated.

C. Environmental Law

The very first *ULJ* article dealt with the environmental problems of Jamaica Bay.⁹³ Volume 7 dealt with the troublesome issue of asbestos, and litigation in relation thereto,⁹⁴ and volume 9 addressed the issue of cogeneration and its dual effects on the environment and the

Roberts v. Public Finance Co., 662 P.2d 330, 332 n.1 (Or. 1983); Banas v. Matthews Int'l Corp., 502 A.2d 637, 648 n.12 (Pa. Super. Ct. 1985).

89. See C579 ALI-ABA 367; C588 ALI-ABA 97; 1985 DUKE L.J. 196 n.1 (1985); 17 HARV. C.R.- C.L. L. REV. 209, 252 n.160 (1982); 41 HASTINGS L.J. 1149, 1158 n.42 (1990); 17 HOFSTRA L. REV. 365, 368 n.17 (1989); 12 J. CORP. L. 105 n.1 (1986); 5 J. L. & COM. 207, 208 n.3 (1984); 15 FORDHAM URB. L.J. 533 n.3 (1986); 12 FORDHAM URB. L.J. 437 n.1 (1988); 44 MD. L. REV. 903, 918 n.70 (1985); 64 N.C. L. REV. 840 n.5 (1986); 13 PEPP. L. REV. 607 n.1 (1986); 321 PLI/Lit 15 (1987); 299 PLI/Lit 153 (1986); 8 ST. LOUIS U. PUB. L. REV. 393 (1989); 14 SETON HALL L. REV. 396 n.1 (1984); 58 TEMP. L.Q. 65 n.3 (1985); 32 UCLA L. REV. 302, 326 n.101 (1984); 61 U. DET. L. REV. 351 n.8 (1984); 51 U. AT MO.-KANSAS CITY L. REV. 189, 191 n.14 (1983); 139 U. PA. L. REV. 197, 200 n.18 (1990); 133 U. PA. L. REV. 227, 245 n.94 (1984); 48 U. PITT. L. REV. 427, 480 n.188 (1987); 60 WASH. L. REV. 209, 210 n.11 (1984).

90. *Teamsters Pension Trust Fund v. Allyn Transp. Co.*, 832 F.2d 502, 505 (9th Cir. 1987); *Trustees of Col. Pipe Indus. Pension Trust v. Howard Electrical & Mechanical, Inc.*, 909 F.2d 1379, 1386 (10th Cir. 1990).

91. Daniel A. Etra, Note, *MPPAA Withdrawal Liability Assessment: Letting the Fox Guard the Henhouse*, 14 FORDHAM URB. L.J. 211 (1986).

92. Richard M. DeAgazio, Note, *Promoting Fairness: A Proposal for a More Reasonable Standard of Constructive Discharge in Title VII Denial of Promotion Cases*, 19 FORDHAM URB. L.J. 979 (1992).

93. See *supra* note 19.

94. Jean A. O'Hare, Comment, *Asbestos Litigation: The Dust Has Yet to Settle*, 7 FORDHAM URB. L.J. 55 (1978).

energy crisis.⁹⁵ Volume 10 focused on the growing issue of solid waste and the problems relating to its disposal,⁹⁶ while volume 11 discussed the subject of acid rain⁹⁷ and suggestions regarding its control.⁹⁸ It was at this point that environmental articles stopped appearing regularly in the *ULJ*. This, however, was not bad news. Instead, it reflected the ushering in of yet another scholarly publication at Fordham Law School — the *Fordham Environmental Law Report*.⁹⁹

D. Ethics

The *Journal* has consistently made substantial contributions to the ongoing discourse concerning legal ethics, government integrity and professional responsibility. In volume 14, Peter Megargee Brown presented a poignant discussion of the serious decline in the American lawyer's professionalism in recent years, which is the result of a shift in focus away from public service to self-serving marketing and productivity.¹⁰⁰ Ultimately, the article challenged the legal profession to halt this decline by returning to the historical purpose of this profession which is to serve the public interest rather than personal interest.¹⁰¹

Similarly, in the foreword to the *Feerick Report*, Cyrus Vance stressed the necessity of maintaining a high level of integrity in the legal profession and government, which translates into public trust and confidence.¹⁰² In order to preserve the highest ethical standards, Mr. Vance put forth that lawyers must accept the responsibility of oversight and enforcement of the rules governing professionalism, including the unpleasant obligation of monitoring and exposing the unethical behavior of fellow practitioners.¹⁰³ These comments were the premise to many important recommendations intended to stimulate

95. Charles M. Pratt, *Cogeneration: A Successful Response to the Energy Crisis?*, 9 FORDHAM URB. L.J. 483 (1981).

96. Donna R. Lanza, Comment, *Municipal Solid Waste Regulation: An Ineffective Solution to a National Problem*, 10 FORDHAM URB. L.J. 215 (1982).

97. Acid rain is rainfall or other forms of precipitation composed in part of sulfuric or nitric acid. Deborah J. Hartman, *Alternatives for Regulatory Control of Acid Rain in the Northeastern United States*, 11 FORDHAM URB. L.J. 455 (1983).

98. *Id.*

99. See *supra* note 12.

100. Peter Megargee Brown, *The Quiet Revolution in the American Law Profession: Remarks Before the Commission on Professionalism of the American Bar Association*, 14 FORDHAM URB. L.J. 855 (1986).

101. *Id.* at 871-72.

102. Cyrus Vance, *Foreword: Legal Ethics and Government Integrity*, 18 FORDHAM URB. L.J. 153 (1990-1991). Cyrus Vance has had a most distinguished career, including being the United States Secretary of State under President Jimmy Carter (1977-80).

103. *Id.* at 153-54.

continued attention to the critical challenge of maintaining superior ethical standards.¹⁰⁴ The subsequent blueprint for government integrity outlined by the *Feerick Commission* acknowledged a vigilant struggle against corruption, while imposing responsibility upon honest government officials and private citizens to preserve clear lines of communication. The Report called for reforms which would safeguard the public from future government corruption.¹⁰⁵

A subsequent article called for a public discourse concerning important ethical issues addressed in the 1990 version of the Lawyer's Code of Professional Responsibility.¹⁰⁶ It described the 1990 amendments to the New York Code of Professional Responsibility and explained the similarities and differences between the 1990 Code and the Model Rules of Professional Conduct. It concluded that the 1990 Code would provide an improved guide for the entire profession giving both high ethical aspirations and practical guidelines for the lawyer.¹⁰⁷

Finally, two notes proposed specific improvements to the existing professional standards. One claimed that a clear "*per se*" rule prohibiting prosecutors' involvement in criminal cases that overlap with cases from their private practices would eliminate potential conflict of interest, benefitting the entire criminal justice system.¹⁰⁸ The other note asserted that *pro bono* work is the responsibility of every lawyer and law student, thus creating a duty for law schools to actively prepare prospective lawyers for this future responsibility.¹⁰⁹

E. Family Law

The *Journal* has covered a wide range of domestic issues — from child abuse and custody to battered wives. Several articles focused specifically on the rights and protection of children. An early article attempted to balance the public's right to know that their funds are

104. Vance, *supra* note 102, at 156.

105. New York State Commission on Government Integrity, *Restoring the Public Trust: A Blueprint for Government Integrity*, 18 FORDHAM URB. L.J. 173, 174-76 (1991).

106. Marjorie E. Gross, *The Long Process of Change: The 1990 Amendments to the New York Code of Professional Responsibility*, 18 FORDHAM URB. L.J. 283 (1991).

107. *Id.* at 333.

108. Kara S. Donohue, Note, *Prosecutorial Ethics: The Case for the Per Se Rule*, 18 FORDHAM URB. L.J. 407 (1991).

109. Frederick J. Martin III, Note, *Law School's Pro Bono Role: A Duty to Require Student Public Service*, 17 FORDHAM URB. L.J. 359, 381 (1989). Whether such participation should be voluntary or mandatory is the subject of much debate. See Roger C. Cramtan, *Symposium on Mandatory Pro Bono*, 19 HOFSTRA L. REV. 1113 (1991). See also Gary Spenser, *Decision Delayed a Year on Mandatory Pro Bono Rule*, N.Y. L.J., May 22, 1992, at 1.

being spent in a productive and prudent manner against an institutionalized minor's right to be free from unwarranted invasions of privacy.¹¹⁰ It concluded that government intervention is necessary for oversight and to secure managerial accountability, but must not extend to derogation of the child's personality.¹¹¹

ULJ notes have also examined the history and effectiveness of child protection laws. One recognized an increase in the reporting of child abuse and maltreatment, but cited an existing system that was incapable of adequately protecting the child or rehabilitating the family.¹¹²

Several other notes proposed deterrents seeking the protection of battered wives.¹¹³ One note argued that although wife abuse is prevalent throughout society, it has only recently gained the proper attention, and necessitates comprehensive domestic violence legislation to bring more batterers before the courts, ensuring that they are adequately sanctioned.¹¹⁴ Another note discussed the difficult challenge of providing adequate police protection in such domestic violence situations.¹¹⁵

A considerable focus has also been placed upon child custody, foster care and child support. An early article discussed the importance to the child, the natural parents, foster parents, and society of recognizing the best interest and well-being of the child as the determining factor in child custody proceedings.¹¹⁶ The article suggested a list of elements for the legislature to consider in providing guidance for the judiciary on what is in the best interest of the child.¹¹⁷

A recent article examined parental rights of incarcerated mothers in New York, claiming they lacked effective access to court proceedings involving their children.¹¹⁸ It proposed an amendment which would help ensure that mothers who desired meaningful relationships

110. Katherine M. Lordi, *Accountability Versus Privacy: The Plight of Institutionalized Emotionally Disturbed Children*, 5 FORDHAM URB. L.J. 223 (1977).

111. *Id.* at 223, 238.

112. Iris Ann Albstein, Note, *Child Abuse and Maltreatment: The Development of New York's Child Protection Laws*, 5 FORDHAM URB. L.J. 533, 542-44 (1977).

113. Lisa R. Beck, Note, *Protecting Battered Women: A Proposal for Comprehensive Domestic Violence Legislation in New York*, 15 FORDHAM URB. L.J. 999 (1987); Jeffrey A. Shapiro, Note, *The Inadequate Police Protection of Battered Wives: Can a City and Its Police Be Held Liable Under the Equal Protection Clause?*, 14 FORDHAM URB. L.J. 417 (1986).

114. Beck, *supra* note 113.

115. Shapiro, *supra* note 113.

116. Joseph R. Carrieri & Walter Murawski, *Proposing Standards For Child Custody: The Proceedings, the Role of the Agency, and the Best Interests of the Child*, 6 FORDHAM URB. L.J. 187 (1978).

117. *Id.* at 216.

118. Philip M. Genty, *Protecting the Parental Rights of Incarcerated Mothers Whose*

with their children need not fear permanent termination of their parental rights.¹¹⁹ Similarly, another note examined the issue of the termination of parental rights where the mother engages in prenatal drug abuse.¹²⁰ It concluded that a less severe alternative than the termination of parental rights of drug-abusing mothers would be in the best interests of the child, the parent and the state.

One note argued that the existing foster care system needs to implement transitional programs to enable foster children to live independently and must adjust the age requirement of assistance from eighteen to twenty-one in order to facilitate this process.¹²¹ Another note proposed a similar solution to the child support situation. Since the purpose of child support is to make the parent responsible for the proper development of a child into a productive member of society, this note urged that support should be extended from eighteen years of age to twenty-one, for young adults face economic and employment difficulties during these years.¹²²

F. Housing

The *Journal* has consistently included articles and student notes on housing, as well as zoning and land use issues. Volume 13 published the article "*Not In My Neighborhood*": *Legal Challenges to the Establishment of Community Residences for the Mentally Disabled in New York State*,¹²³ which discussed the laws pertaining to the development of group homes for mentally disabled persons. In volume 16, the same author, Robert Schonfeld, published a sequel article entitled "*Five-Hundred Year Flood Plains*" and *Other Unconstitutional Challenges to the Establishment of Community Residences for the Mentally Retarded*.¹²⁴

Children Are In Foster Care: Proposed Changes to New York's Termination of Parental Rights Law, 17 FORDHAM URB. L.J. 1 (1989).

119. *Id.* at 25-26.

120. Jennifer M. Mone, Note, *Has Connecticut Thrown Out the Baby With the Bath Water? Termination of Parental Rights and In re Valerie D.*, 19 FORDHAM URB. L.J. 535 (1992). This note discusses the case of *In re Valerie D.* which received great notoriety. Indeed, the Supreme Court of Connecticut recently ordered a new trial on the issue of whether the mother's rights were wrongfully terminated. See Kirk Johnson, *Child Abuse Is Ruled Out In Birth Case*, N.Y. TIMES, Aug. 18, 1992, at B1.

121. Mari Brita Maloney, Note, *Out of the Home Onto the Street: Foster Children Discharged Into Independent Living*, 14 FORDHAM URB. L.J. 971 (1986).

122. Nicholas C. Dipiazza, Note, *The Effect of the New Age of Majority on Preexisting Child Support Settlements*, 5 FORDHAM URB. L.J. 365 (1977).

123. Robert L. Schonfeld, "*Not In My Neighborhood*": *Legal Challenges to the Establishment of Community Residences for the Mentally Disabled in New York State*, 13 FORDHAM URB. L.J. 281 (1985).

124. Robert L. Schonfeld, "*Five-Hundred Year Flood Plains*" and *Other Unconstitu-*

Volume 18 devoted book III to the area of housing. More specifically, that issue contained a significant article on the effects of gentrification,¹²⁵ and the concept of an eviction-free zone.¹²⁶ It also published a significant piece on HUD and the housing crisis in the 1990s.¹²⁷

Additionally, the *Journal* published two articles covering the controversial subject of regulatory "takings" affecting property.¹²⁸ It also published an article entitled *Shattering the Myth of Municipal Impotence: The Authority of Local Government to Create Affordable Housing*,¹²⁹ which argued that municipal governments have the authority and competence to induce the development of affordable housing. Volume 17 also contained a student note on the celebrated *Yonkers* desegregation case.¹³⁰

Consistent with the *Journal's* "urban" tradition, these particular subjects concerning housing continue to be explored and highlighted. Recently, book I of volume 19 included a colloquium on affordable housing which takes a critical look at New Jersey's renown *Mount*

tional Challenges to the Establishment of Community Residences for the Mentally Retarded, 16 FORDHAM URB. L.J. 1 (1988).

125. Gentrification, the influx of high income dwellers into low income neighborhoods, has in the past decade become a serious cause of concern to low income tenants in older American cities. See Lawrence K. Kolodney, *Eviction Free Zones: The Economics of Legal Bricolage in the Fight Against Displacement*, 18 FORDHAM URB. L.J. 507, 508 (1991).

126. *Id.*

127. Michael Allen Wolf, *HUD and Housing in the 1990s: Crisis in Affordability and Accountability*, 18 FORDHAM URB. L.J. 545 (1991).

128. See, e.g., Ross B. Lipsaker and Rebecca L. Heldt, *Regulatory Takings: A Contract Approach*, 16 FORDHAM URB. L.J. 195 (1988); John Martinez, *Reconstructing the Takings Doctrine By Redefining Property and Sovereignty*, 16 FORDHAM URB. L.J. 157 (1988). The takings problem involves an interplay of property, government and the boundary between the two. *Id.* at 158. The study of the takings problem is important so that people whose property expectations are negatively affected by governmental action can legitimately complain in situations where the government has overstepped its bounds. *Id.* See also *Property Gains*, WALL ST. J., July 1, 1992, at A14; Ted Gest and Lisa J. Moore, *The Tide Turns for Property Owners*, U.S. NEWS AND WORLD REPORT, July 13, 1992, at 57; David W. Dunlap, *Resolving Property "Takings": Courts Tilt to Owners*, N.Y. TIMES, August 23, 1992, § 10, at 1. "I think the courts have come to place a great value on property rights under the Constitution, says Norman Marcus, former general counsel of the New York City Planning Department." *Id.*

129. John R. Nolon, *Shattering the Myth of Municipal Impotence: The Authority of Local Government to Create Affordable Housing*, 17 FORDHAM URB. L.J. 383 (1989).

130. Amy Walsh, Note, *The Yonkers Case: Separation of Powers As a Yardstick For Determining Official Immunity*, 17 FORDHAM URB. L.J. 217 (1989). See also Lynda Richardson, *Yonkers Approves Housing Plan*, N.Y. TIMES, April 15, 1992, at B1; Lynda Richardson, *U.S. Judge Lets Yonkers Try Its Housing Approach*, N.Y. TIMES, July 16, 1992, at B6.

Laurel housing mandate.¹³¹ The *Journal* first addressed the *Mount Laurel* doctrine, a rule which requires municipal land use regulations to provide for the construction of low and moderate income housing, in volume 16.¹³² Still another article dealt with the issue of the conversion of lofts¹³³ into housing and discussed legislation intended to deal with the inadequacies of loft conversion laws.¹³⁴

Finally, book III of volume 19 contains a significant article by Norman Marcus on zoning which calls for the overhaul and modernization of the almost one thousand pages of land use regulations governing New York City.¹³⁵

G. Public Reports

As previously mentioned, the *ULJ* has been the proud publisher of several noteworthy public reports.¹³⁶ Publishing these landmark reports is especially important in order to disseminate them to the legal community.

The *Report on the New York Task Force on Women in the Courts*¹³⁷ remains the most requested publication of any journal at Fordham Law School, and it is anticipated that the follow-up Report, the *Five Year Report of the New York Judicial Committee on Women in the Courts*, will be equally successful.¹³⁸ Indeed, a task force of judges, attorneys, academics and lay persons — The Ninth Judicial District Committee to Promote Gender Fairness in the Courts — recently asserted that “its examination ‘supports the conclusion’ of gender bias found in 1986 by the State Task Force on Women in the Courts.”¹³⁹

The *Feerick Report*¹⁴⁰ on ethics in government (of which several

131. Paula A. Franzese, *Mount Laurel and the Fair Housing Act: Success or Failure?*, 19 FORDHAM URB. L.J. 59 (1991).

132. Rachel Fox, *The Selling Out of Mount Laurel: Regional Contribution Agreements in New Jersey's Fair Housing Act*, 16 FORDHAM URB. L.J. 535 (1988).

133. After the Second World War, many factories began to move from urban lofts to suburban and rural areas which offered greater space, lower rents, cheaper labor and various tax incentives. As these urban lofts became vacant, and housing needs increased, a great interest arose in converting these lofts to residential use. See William Eckstein, Note, *An Evaluation of New York Loft Conversion Law*, 10 FORDHAM URB. L.J. 511 (1982).

134. *Id.*

135. Norman Marcus, *New York City Zoning — 1961-1991: Turning Back The Clock — But With an Up-to-the-Minute Social Agenda*, 19 FORDHAM URB. L.J. 707 (1992).

136. See *supra* notes 53-65 and accompanying text.

137. See *supra* note 53.

138. See *supra* note 57.

139. Martin Fox, *Panel Finds Gender Bias in Westchester Courts*, N.Y. L.J., May 8, 1992, at 2; see also Junda Woo, *Widespread Sexual Bias Found In Courts*, WALL ST. J., August 20, 1992, at B1.

140. See *supra* note 58.

thousand copies have already been distributed) serves as a standard of future acceptable conduct in government.

The *Frivolous Litigation Report* addressed the troublesome issue of abusive litigation, and suggested recommendations to curb such abuse.¹⁴¹

Book II of volume 19 published the New York State Judicial Commission's *Minorities Report*.¹⁴² Chief Judge Wachtler adopted the Commission's initial recommendation and appointed an ongoing committee to implement the *Minorities Report*.¹⁴³ The impact of this Report is already being reflected in discussion arising out of the recent Rodney King verdict in California.¹⁴⁴

H. Securities Arbitration

Prior to 1977 fewer than 1,000 securities arbitration disputes per year were being administered before the various Securities Regulatory Organizations ("SROs") under differing procedures.¹⁴⁵ In 1977 the Securities Industry Conference on Arbitration ("SICA")¹⁴⁶ was formed to update and consolidate such rules. SICA consisted of representatives of various SROs,¹⁴⁷ the Securities Industry Association ("SIA")¹⁴⁸ and the public.¹⁴⁹ SICA developed a Uniform Code of Arbitration ("SICA Code") in 1979;¹⁵⁰ and, the number of SRO arbitrations continued to grow¹⁵¹ until they reached slightly under 3,000

141. See *supra* note 59.

142. See *supra* note 64.

143. See Sol Wachtler, *Introduction to MINORITIES REPORT*, 19 FORDHAM URB. L.J. 175, 178 (1992).

144. See Edward A. Adams, *Debate Continues On Minorities In Court System*, N.Y. L.J., May 8, 1992, at 1 ("The report concluded there are 'two justice systems at work in the courts of New York State, one for whites, and a very different one for minorities and the poor.' " *Id.*); *Race: Our Dilemma Still*, NEWSWEEK, May 11, 1992, at 44.

145. See Constantine N. Katsoris, *The Arbitration of a Public Securities Dispute*, 53 FORDHAM L. REV. 279 (1984).

146. See FIFTH REPORT OF THE SECURITIES INDUSTRY CONFERENCE ON ARBITRATION 2-3 (Apr. 1986) [hereinafter FIFTH REPORT].

147. The following SROs were represented: the American, Boston, Cincinnati, Midwest, New York, Pacific and Philadelphia Stock Exchanges, the Chicago Board Options Exchange, the Municipal Securities Rulemaking Board, and the National Association of Securities Dealers. FIFTH REPORT, *supra* note 146, at 3.

148. *Id.* The SIA is a trade association for the securities industry.

149. *Id.* Originally only three public members were appointed. In 1983, the number of public members was increased to four, its present number. *Id.* at 3.

150. See FIFTH REPORT, *supra* note 146, at 4.

151. Between 1980-1985, the number of SRO securities arbitrations increased each year as follows: 830 (1980); 1,042 (1981); 1,340 (1982); 1,731 (1983); 2,449 (1984); and 2,796 (1985). See FIFTH REPORT, *supra* note 146, at 7.

in 1986.¹⁵²

In 1953 the Supreme Court in *Wilko v. Swan*¹⁵³ held that pre-dispute arbitration agreements were unenforceable as to claims based upon the Securities Act of 1933 ("1933 Act").¹⁵⁴ Most courts presumed that this *Wilko* prohibition also extended to the Securities Exchange Act of 1934 ("1934 Act"),¹⁵⁵ and thus — despite pre-dispute arbitration agreements — refused to order arbitration for customers' claims arising under the 1934 Act.¹⁵⁶ This problem was further exacerbated by the Supreme Court in *Dean Witter Reynolds, Inc. v. Byrd*,¹⁵⁷ which held that when an arbitrable claim¹⁵⁸ is joined with a non-arbitrable *Wilko* claim, the claims need not be tried together involuntarily — even if they were intertwined.¹⁵⁹ In other words, the two related claims could be tried separately and simultaneously — one in arbitration and the other in court.

In volume 14 the *Journal* published *The Securities Arbitrators' Nightmare*¹⁶⁰ which pointed out that the Supreme Court decision in *Dean Witter Reynolds v. Byrd* — by permitting the automatic bifurcation of similar claims — would set two separate forums on a collision course. The article went on to point out the problems that such separate litigations would cause to litigants and arbitrators.¹⁶¹ Fortunately, the problem was rendered moot by the Supreme Court shortly after the publication of this article.

In 1987, the Supreme Court in *Shearson/American Express Inc. v. McMahon*¹⁶² ruled that claims based upon the 1934 Act were arbitrable.¹⁶³ The effect of this landmark decision was to direct many cases

152. See SIXTH REPORT OF THE SECURITIES INDUSTRY CONFERENCE ON ARBITRATION 4 (Aug. 1989) [hereinafter SIXTH REPORT].

153. 346 U.S. 427 (1953).

154. 15 U.S.C. § 77 (1982).

155. 15 U.S.C. § 78 (1982).

156. See Constantine N. Katsoris, *The Arbitration of a Public Securities Dispute*, 53 FORDHAM L. REV. 279, 299-301 (1984).

157. 470 U.S. 213 (1985).

158. One based on state law, and therefore not covered by the *Wilko* prohibition.

159. Some courts had held that if two claims (one covered and one not covered by the *Wilko* prohibition) were so intertwined that it was impractical or impossible to separate them, then they would be ordered to be litigated together. See Constantine N. Katsoris, *The Arbitration of a Public Securities Dispute*, 53 FORDHAM L. REV. 279, 303-304 (1984).

160. Constantine N. Katsoris, *The Securities Arbitrators' Nightmare*, 14 FORDHAM URB. L.J. 3, 4 (1986); *Dean Witter Reynolds v. Byrd*, 470 U.S. 213 (1985).

161. Katsoris, *supra* note 160, at 9-11.

162. 482 U.S. 220 (1987).

163. *Id.* at 238. In 1989, the Supreme Court in *Rodriguez de Quijas v. Shearson/American Express Inc.*, 490 U.S. 477 (1989), undid the *Wilko* exception entirely and held that pre-dispute arbitration agreements would be upheld, even as to issues arising under the 1933 Act.

that were previously litigated in court to arbitration.¹⁶⁴ Indeed, in the year after *McMahon*, securities arbitrations filed with the SROs exceeded 6,000¹⁶⁵ — more than double the number filed in the year before *McMahon*.¹⁶⁶

Shortly thereafter, the *Journal* published *Securities Arbitration After McMahon*,¹⁶⁷ which reported on the effects of the *McMahon* decision on securities arbitration.¹⁶⁸ Furthermore, it suggested that the feasibility of a single independent forum be explored for the resolution of such disputes.¹⁶⁹

In the very next volume, *The Level Playing Field* was published,¹⁷⁰ outlining and explaining the numerous changes which were made to the SICA Code of Arbitration following the *McMahon* decision.¹⁷¹ In doing this, it traced the legislative history of the SICA Code, and provided invaluable insight into its provisions.¹⁷² Moreover, it traced the SICA Code into the individual codes of the various SROs.¹⁷³

More recently, volume 18 published *Punitive Damages In Securities Arbitration: The Tower of Babel Revisited*.¹⁷⁴ It addressed the unfairness of allowing punitive damages in court litigation, but denying such relief in arbitration.¹⁷⁵

These four *ULJ* articles on arbitration have been widely reproduced and distributed at seminars throughout the country¹⁷⁶ and extensively

164. See SIXTH REPORT, *supra* note 152, at 1-2.

165. *Id.* at 4.

166. *Id.* In addition, over 500 similar securities disputes were filed last year with the American Arbitration Association. See Frank Zotto, *New Record in Securities Cases*, ARBITRATION TIMES, Spring 1992, at 3.

167. Constantine N. Katsoris, *Securities Arbitration After McMahon*, 16 FORDHAM URB. L.J. 361 (1988).

168. *Id.* at 368.

169. *Id.* at 383-86.

170. Constantine N. Katsoris, *The Level Playing Field*, 17 FORDHAM URB. L.J. 419 (1990).

171. *Id.* at 430-52.

172. *Id.* at 431-52.

173. *Id.* at 452-54.

174. Constantine N. Katsoris, *Punitive Damages In Securities Arbitration: The Tower of Babel Revisited*, 18 FORDHAM URB. L.J. 573 (1991). This article will also be printed in Clark Boardman's 1993 SECURITIES LAW REVIEW. (Reprint request and permission on file in *ULJ* office).

175. *Id.* at 602-4.

176. Resolving Securities Disputes at 181-93 (PLI 1986); Securities Arbitration 1988 at 729-57 (N.Y. Institute of Finance); Broker Dealer Institute 1988 (PLI); First NASD Annual Securities Arbitration Seminar (1988); Securities Arbitration Update Seminar at 187-214 (Prentice Hall Law & Business 1989); Securities Arbitration 1990 at 909-98 (PLI/AAA); National Arbitration Seminar (NASD 1990); Arbitration Seminar (N.Y. Co. Lawyers Assoc. 1991); A Practitioner's Guide to Broker Disputes (Fordham Continuing Legal Education 1991); Arbitration Seminar 1992 at 187-214 (PLI/AAA); Arbitra-

cited by courts, journals, texts, periodicals and the media.¹⁷⁷ Many of the issues they raised were recently discussed in a report of the General Accounting Office ("GAO") which probed the fairness of such SRO arbitration programs.¹⁷⁸

tion Training Seminar (NASD 1992). See also 1993 SECURITIES LAW REVIEW, *supra* note 174.

177. P. Hoblin, *The Case For a Single Securities & Commodities Arbitration Forum*, COM. LAW LETTER, Aug. 1989, at 8; Kurt A. Peterson, Note, *The Arbitrability of Claims Under the Federal Securities Law*, 12 J. CORP. L. 535, 565 n.257 (1987); Lee Applebaum, *Predispute Arbitration Agreements Between Brokers and Investors: The Extension of Wilko to Section 10(b) Claims*, 46 MD. L. REV. 338, 371-72 n.249 (1989); J. Kirkland Grant, *Securities Arbitration: Is Required Arbitration Fair to Investors?*, 24 NEW ENG. L. REV. 389, 398 n.39 (1989); Patricia A. Shub, Note, *Shearson/American Express, Inc. v. McMahon: The Expanding Scope of Securities Arbitration*, 12 NOVA L. REV. 1375, 1377 n.16 (1988); 535 PLI/Corp. 17; 621 PLI/Corp. 789; J.M. Girault, Note, *Shearson/American Express, Inc. v. McMahon: What's Left For the Courts in Securities Litigation?*, 62 TUL. L. REV. 284, 287 n.22 (1987); Laura Ginger, *Managing Securities Disputes After McMahon: A Call for Consolidation and Arbitration*, 33 VILL. L. REV. 515, 516 n.6 (1988); Michael Durrer, Note, *Enforcing Arbitration of Federal Securities Law Claims*, 28 WM. & MARY L. REV. 335, 353 n.101 (1987); 12 TUL. MAR. L.J. 19; Constantine N. Katsoris, *Securities Arbitration After McMahon*, 16 FORDHAM URB. L.J. 361, 370 n.64 (1988); Constantine N. Katsoris, *The Level Playing Field*, 17 FORDHAM URB. L.J. 419, 426 n.45 (1990); Diana B. Henriques, *When Naivete Meets Wall Street*, N.Y. TIMES, Dec. 3, 1989, § 3, at 1; P. HOBLIN, SECURITIES ARBITRATION: PROCEDURES, STRATEGIES AND CASES, Supp. No. 5 at 24 (Sept. 1990) S5-119; Janet E. Kerr, *The Arbitration of Securities Law Disputes After Rodriguez and the Impact on Investor Protection*, 73 MARQ. L. REV. 217, 243 n.199 (1989); Donald Arthur Winslow and Seth C. Anderson, *A Model for Determining the Excessive Trading Element in Churning Claims*, 68 N.C. L. REV. 327, 339 n.33 (1990); C. Evan Stewart, *Securities Arbitration Appeal: An Oxymoron No Longer?*, 79 KY. L.J. 347, 348 n.4 (1991); Leslie William Moore, *Rodriguez De Quijas v. Shearson/American Express, Inc.: Is Securities Arbitration Finally Above Suspicion?*, 78 KY. L.J. 839, 848 n.82 (1990); Perry E. Wallace, *Securities Arbitration After McMahon, Rodriguez, and the New Rules: Can Investors' Rights Really Be Protected?*, 43 VAND. L. REV. 1199, 1201-2 n.9 (1990); 3 SECURITIES ARB. COM. NO. 3, March 1990, at 5; Constantine N. Katsoris, *"I Won't Sit Without a Record"*, 3 SECURITIES ARB. COM. NO. 9, Sept. 1990, at 1; Diana B. Henriques, *Wall Street: Who's to Settle Cross-Border Spats?*, N.Y. TIMES, April 29, 1990, at F15; WALL ST. J., Aug. 24, 1990, at C1; WALL ST. J., Aug. 31, 1990, at C1; 23 SECURITIES & COMMODITIES REG. 17, Oct. 1990, at 178; David A. Lipton, *Generating Precedent in Security Industry Arbitration*, 19 SEC. REG. L.J. 26, 35 n.33 (1991); S. GOLDBERG, PUNITIVE DAMAGES IN SECURITIES ARBITRATION, Public. Inv. Arb. Bar Assoc. Report 112 (1991); ABRAMS, THE LAW OF CIVIL RICO 86 (1991); *Arbitration*, NAT'L L.J., Mar. 2, 1992, at 24; *Weidman v. Fuchsberg*, N.Y. L.J., Nov. 18, 1991, at 21 (citing *Weidman v. Fuchsberg*, 576 N.Y.S.2d 232, 235 (1st Dept. 1991)); Richard Rescigno, *Brokers v. Customers: The Business of Deciding Their Disputes Is Booming*, BARRON'S, March 23, 1990, at 18, 19; 4 SECURITIES ARB. COM. NO. 6 (Oct. 1991) at 12-13; JACQUELINE NOLAN-HALEY, ALTERNATIVE DISPUTE RESOLUTION IN A NUTSHELL 186 (1992).

178. GAO Report B-247464, May 11, 1992. See also Diana B. Henriques, *Wall St. Arbitration Programs Criticized*, N.Y. TIMES, May 12, 1992, at D1; *Securities Arbitration Doesn't Favor Broker, Study By GAO Says*, WALL ST. J., May 13, 1992, at C11; *Arbitration on Wall Street Surges But Probe Questions Its Fairness*, INVESTOR'S DAILY, May 13,

I. Taxation

The *Journal* has also had several tax articles of note. The former New York State Commissioner of Taxation and Finance, Joseph H. Murphy, contributed an article entitled *State and Local Tax Incentives for Urban Growth: A Concept Whose Time Never Was?*¹⁷⁹ The article discussed the principal tax benefit programs available to private businesses which invest in urban industrial and commercial development and in housing construction.¹⁸⁰

Another tax article, appearing in volume 15, *The New York State Tax Windfall*,¹⁸¹ covered the sweeping effects of the 1986 Federal Tax Reform Act upon states in general, and New York in particular. This article was cited in the *National Law Journal's* "Worth Reading" column¹⁸² and was distributed by a member of the New York State Senate to the Governor of New York and to each member of that legislature. Shortly thereafter, the New York State income tax rates were substantially lowered in a manner reflecting many of the recommendations of the article.¹⁸³

More recently, volume 18 contained an article entitled *Tax Increment Financing: A Potential Redevelopment Financing Mechanism for New York Municipalities*.¹⁸⁴ This article analyzed the New York Tax Increment Financing Law and suggested using tax mechanisms as a method of financing urban redevelopment.¹⁸⁵

J. Other Urban Issues and Events

The *ULJ's* articles dealing with miscellaneous urban problems are too numerous to cite.¹⁸⁶ For example, the *Journal* has made valuable contributions to the areas of municipal financing and economic development, covering such topics as: tax incentives for urban growth;¹⁸⁷

1992, at 20; *Industry, AAA Arbitration Panels Treat Customers Similarly, GAO Finds*, WORLD ARBITRATION AND MEDIATION REPORT, Vol. 3, No. 6, June 1992, at 135-36.

179. Joseph H. Murphy, *States and Local Tax Incentives for Urban Growth: A Concept Whose Time Never Was?*, 6 FORDHAM URB. L. J. 455 (1978).

180. *Id.*

181. Constantine N. Katsoris, *The New York State Tax Windfall*, 15 FORDHAM URB. L.J. 199 (1986).

182. NAT'L L.J., July 13, 1987, at 25.

183. These rate cuts were implemented in installments, and unfortunately, the last of such cuts has recently been suspended, the victim of the New York State's budget crisis. See Chris McKenna, *Taxpayers Foot \$1.5B Bill in Budget Deal*, N.Y. POST, April 3, 1992, at 2.

184. Gary P. Winter, *Tax Increment Financing: A Potential Redevelopment Financing Mechanism for New York Municipalities*, 18 FORDHAM URB. L.J. 655 (1991).

185. *Id.*

186. See *supra* notes 18-67, and *infra* Appendix attached hereto.

187. See *supra* note 179.

fiscal emergency legislation during times of urban economic crisis,¹⁸⁸ and federal financing of urban economic development.¹⁸⁹ In volume 9, former Governor Hugh Carey contributed an article on incentives for new business development,¹⁹⁰ which recognized that each state's and the nation's economic futures depend heavily upon the ability of small businesses to withstand the process of rapid economic change.¹⁹¹ It discussed areas where reform would improve the business climate, namely: tax incentives, finance initiatives, and regulatory reforms.¹⁹²

Book III of volume 19 marks an inaugural effort on the part of the *Journal* to tap local resources for positive solutions to some of the cities' concerns. These essays are varied and reflect the experiences of the individual authors regarding the problems our cities face.¹⁹³ Although the problems which plague America's cities are not necessarily unique to urban areas, because of the concentration therein, it is the cities that must take the lead in finding solutions to these societal challenges. While no one advocated a sweeping federal "bail out" of local government, many authors argued persuasively for federal assistance — not so much fiscally, but rather in the form of cooperative efforts to effectuate legislative change — in order to assist cities in serving their citizens.¹⁹⁴ By far the most popular theme throughout this issue is the revitalization of city government. Indeed, as the current system may not be operating effectively, some contributors suggested that possibilities for positive change may lie in considering privatization of city services, restructuring existing agencies and reevaluating mechanisms for increased efficiency or proficiency in particular government functions such as zoning, health care, the environment, and education.¹⁹⁵ Beyond revitalizing city government, lawyers and members of the community in general are also called upon to fulfill their responsibility through public service and coalition

188. Gayle Gutekunst-Roth, Comment, *New York — A City In Crisis: Fiscal Emergency Legislation and the Constitutional Attacks*, 6 FORDHAM URB. L.J. 65 (1977).

189. S. William Green and Nancy W. Hunt, *Federal Financing of Urban Economic Development*, 9 FORDHAM URB. L.J. 815 (1980).

190. Hugh L. Carey, *New Business Development*, 9 FORDHAM URB. L.J. 785 (1981).

191. *Id.* at 788.

192. *Id.* at 788-98.

193. This collection of essays has been arranged in conjunction with the Stein Center for Ethics and Public Interest Law. The Stein Center sponsors an annual symposium on current ethical issues, round table discussion among practitioners and scholars engaged in public interest law, and the Stein Scholars Program.

194. See *Introduction*, 19 FORDHAM URB. L.J. 563, 564 (1992).

195. *Id.* at 564-65.

building.¹⁹⁶

Finally, in an attempt to expand beyond the written word, the *ULJ* recently created a new Board position, the Symposium Editor. This Editor will have primary editorial responsibility for the annual symposium issue which will serve as an ongoing forum for debate on the problems of our urban centers. The responsibilities of the Symposium Editor will also include the organization of an annual conference which will address the issues raised in the symposium issue.

IV. Recognition/Citations

The *ULJ* has been cited extensively by numerous federal and state courts,¹⁹⁷ including the United States Supreme Court.¹⁹⁸ Moreover, it

196. *Id.* at 565.

197. 15 FORDHAM URB. L.J. 877 (1987) *noted in* 486 U.S. 622, 644 (1988); 6 FORDHAM URB. L.J. 481 (1978) *noted in* 456 U.S. 461, 487 n.2 (1982); 14 FORDHAM URB. L.J. 211 (1986) *noted in* 909 F.2d 1379, 1386 (10th Cir. 1990); 6 FORDHAM URB. L.J. 333 (1978) *noted in* 810 F.2d 426, 430 (4th Cir. 1987); 7 FORDHAM URB. L.J. 55 (1978) *noted in* 781 F.2d 394, 416 n.2 (5th Cir. 1986); 8 FORDHAM URB. L.J. 429 (1980) *noted in* 775 F.2d 425, 438 (1st Cir. 1985); 13 FORDHAM URB. L.J. 113 (1985) *noted in* 771 F.2d 663, 667 (2d Cir. 1985); 10 FORDHAM URB. L.J. 469 (1982) *noted in* 756 F.2d 230, 241 (2d Cir. 1985); 6 FORDHAM URB. L.J. 399 (1978) *noted in* 752 F.2d 694, 696 n.7 (D.C. Cir. 1985); 9 FORDHAM URB. L.J. 457 (1980) *noted in* 737 F.2d 582, 590 n.10 (7th Cir. 1984); 10 FORDHAM URB. L.J. (1981) *noted in* 721 F.2d 894, 896 n.4 (3d Cir. 1983); 7 FORDHAM URB. L.J. 55 (1978) *noted in* 684 F.2d 111, 113 n.3 (D.C. Cir. 1982); 8 FORDHAM URB. L.J. 913 (1980) *noted in* 633 F.2d 486, 491 n.6 (7th Cir. 1980); 8 FORDHAM URB. L.J. 301 (1980) *noted in* 634 F.2d 19, 28 n.24 (2d Cir. 1980); 5 FORDHAM URB. L.J. 549 (1977) *noted in* 619 F.2d 623, 626 n.12 (7th Cir. 1980); 5 FORDHAM URB. L.J. 455 (1977) *noted in* 612 F.2d 821, 827 n.5 (4th Cir. 1979); 2 FORDHAM URB. L.J. 179 (1974) *noted in* 559 F.2d 921, 923 n.9 (4th Cir. 1977); 2 FORDHAM URB. L.J. 163 (1973) *noted in* 540 F.2d 1114, 1125 (D.C. Cir. 1976); 15 FORDHAM URB. L.J. 877 (1987) *noted in* 749 F. Supp. 1569, 1574 (N.D. Ala. 1990); 15 FORDHAM URB. L.J. 877 (1987) *noted in* 709 F. Supp. 95, 97 (M.D. Pa. 1988); 12 FORDHAM URB. L.J. 625, 632 (1984) *noted in* 692 F. Supp. 629 (W.D. Va. 1988); 14 FORDHAM URB. L.J. 441 (1986) *noted in* 677 F. Supp. 1362, 1369 n.2 (M.D. Tenn. 1988); 14 FORDHAM URB. L.J. 685 (1986) *noted in* 118 F.R.D. 534, 544 (S.D. Fla. 1988); 7 FORDHAM URB. L.J. 55 (1978) *noted in* 666 F. Supp. 535, 547 n.16 (S.D.N.Y. 1988); 7 FORDHAM URB. L.J. 55 (1978) *noted in* 649 F. Supp. 1340, 1343 (D. Del. 1986); 5 FORDHAM URB. L.J. 455 (1977) *noted in* 648 F. Supp. 1061, 1071 (N.D. Tex. 1986); 10 FORDHAM URB. L.J. 103 (1981) *noted in* 574 F. Supp. 325, 344 (E.D. La. 1983); 10 FORDHAM URB. L.J. 1 (1981) *noted in* 535 F. Supp. 1353, 1356 (S.D.N.Y. 1982); 7 FORDHAM URB. L.J. 55 (1978) *noted in* 529 F. Supp. 539, 544 n.3, n.4 (D. Minn. 1982); 9 FORDHAM URB. L.J. 457 (1980) *noted in* 523 F. Supp. 819, 832 n.12 (N.D. Tex. 1981); 7 FORDHAM URB. L.J. 55 (1978) *noted in* 509 F. Supp. 1353, 1354 n.3 (E.D. Tex. 1981); 5 FORDHAM URB. L.J. 549 (1977) *noted in* 496 F. Supp. 1127, 1134 n.8 (D. Conn. 1980); 4 FORDHAM URB. L.J. 546 (1976) *noted in* 427 F. Supp. 1175, 1180 (S.D.N.Y. 1976); 2 FORDHAM URB. L.J. 179 (1974) *noted in* 424 F. Supp. 146, 147 n.2 (E.D. Va. 1976); 12 FORDHAM URB. L.J. 459 (1984) *noted in* 41 Fair Empl. Prac. Cas. (BNA) 1032; 7 FORDHAM URB. L.J. 693 (1979) *noted in* 20 B.R. 434, 436 (Bankr. D. Kan. 1982); 11 FORDHAM URB. L.J. 927 (1983) *noted in* 496 A.2d 997, 1012 n.13 (Del. 1985); 10 FORDHAM URB. L.J. 1 (1981) *noted in* 810 S.W.2d 910, 914 (Ark. 1991); 10 FORDHAM URB. L.J. 749 (1982) *noted in* 238 Cal. Rptr. 232, 240 (Cal. Ct. App. 1987); 13

has been cited and/or quoted over *five hundred* times by over *one*

FORDHAM URB. L.J. 553 (1985) *noted in* 220 Cal. Rptr. 153, 158 n.4 (Cal. Ct. App. 1985); 11 FORDHAM URB. L.J. 51 (1982) *noted in* 209 Cal. Rptr. 682, 706 (Cal. 1984); 6 FORDHAM URB. L.J. 333 (1978) *noted in* 508 A.2d 728, 732 (Conn. 1986); 2 FORDHAM URB. L.J. 179 (1974) *noted in* 344 N.E.2d 279, 287 n.2 (Ill. App. Ct. 1976); 11 FORDHAM URB. L.J. 973 (1983) *noted in* 697 P.2d 847, 858 (Kan. 1985); 8 FORDHAM URB. L.J. 507 (1980) *noted in* 459 N.E.2d 772, 777 (Mass. 1984); 7 FORDHAM URB. L.J. 617 (1979) *noted in* 436 N.E.2d 155, 157 (Mass. 1982); 2 FORDHAM URB. L.J. 407 (1974) *noted in* 437 A.2d 672, 675 (Md. Ct. Spec. App. 1981); 12 FORDHAM URB. L.J. 513 (1984) *noted in* 526 A.2d 295 (N.J. Super. Ct. Law Div. 1987); 12 FORDHAM URB. L.J. 513 (1984) *noted in* 524 A.2d 478, 488 (N.J. Super. Ct. Law Div. 1987); 15 FORDHAM URB. L.J. 709 (1987) *noted in* 452 N.W.2d 509, 514 n.1 (Minn. Ct. App. 1990); 14 FORDHAM URB. L.J. 971 (1986) *noted in* 427 N.W.2d 662, 665 n.4 (Minn. 1988); 10 FORDHAM URB. L.J. 1 (1981) *noted in* 333 N.W.2d 622, 629 (Minn. 1983); 7 FORDHAM URB. L.J. 63 (1978) *noted in* 319 N.W.2d 45, 51 n.15 (Minn. 1982); 15 FORDHAM URB. L.J. 709 (1987) *noted in* 1992 WL 95969 at 9 (N.Y. Sup. Ct. 1992); 13 FORDHAM URB. L.J. 113 (1985) *noted in* 1991 WL 205708 at 255 (N.Y. 1991); 9 FORDHAM URB. L.J. 185 (1980) *noted in* 317 N.W.2d 428, 447 n.15 (Wis. 1982); 18 FORDHAM URB. L.J. 573 (1991) *noted in* 576 N.Y.S.2d 232, 235 (N.Y. App. Div. 1991); 17 FORDHAM URB. L.J. 128 (1989) *noted in* 566 N.Y.S.2d 500, 504 (N.Y. Sup. Ct. 1991); 11 FORDHAM URB. L.J. 1039 (1983) *noted in* 501 N.Y.S.2d 237 (N.Y. 1990); 10 FORDHAM URB. L.J. 351 (1982) *noted in* 559 N.Y.S.2d 474, 484 n.3 (N.Y. 1990); 15 FORDHAM URB. L.J. 47 (1986) *noted in* 546 N.Y.S.2d 755, 764 (N.Y. Crim. Ct. 1989); 14 FORDHAM URB. L.J. 815 (1986) *noted in* 552 N.Y.S.2d 807, 811 (N.Y. Sup. Ct. 1989); 10 FORDHAM URB. L.J. 247 (1982) *noted in* 538 N.E.2d 1012, 1014 (N.Y. 1989); 2 FORDHAM URB. L.J. 407 (1974) *noted in* 535 N.E.2d 1336, 1339 (N.Y. 1989); 14 FORDHAM URB. L.J. 773 (1986) *noted in* 533 N.E.2d 1030, 1031 (N.Y. 1988); 15 FORDHAM URB. L.J. 821 (1987) *noted in* 531 N.Y.S.2d 287, 289 (N.Y. App. Div. 1988); 15 FORDHAM URB. L.J. 11 (1986) *noted in* 517 N.Y.S.2d 864, 866 (N.Y. Sup. Ct. 1987); 14 FORDHAM URB. L.J. 523 (1986) *noted in* 508 N.E.2d 930, 931 (N.Y. 1987); 13 FORDHAM URB. L.J. 395 (1985) *noted in* 499 N.Y.S.2d 301, 308 n.11 (N.Y. Sup. Ct. 1985); 10 FORDHAM URB. L.J. 247 (1982) *noted in* 487 N.Y.S.2d 359, 362 n.1 (N.Y. App. Div. 1985); 10 FORDHAM URB. L.J. 36 (1981) *noted in* 448 N.E.2d 86, 94 (N.Y. 1983); 10 FORDHAM URB. L.J. 1 (1981) *noted in* 443 N.E.2d 441, 444 n.5 (N.Y. 1982); 9 FORDHAM URB. L.J. 533 (1981) *noted in* 426 N.E.2d 478, 479 (N.Y. 1981); 7 FORDHAM URB. L.J. 305 (1979) *noted in* 439 N.Y.S.2d 309 (N.Y. 1981); 8 FORDHAM URB. L.J. 857 (1980) *noted in* 435 N.Y.S.2d 303, 305 (N.Y. App. Div. 1981); 5 FORDHAM URB. L.J. 401 (1977) *noted in* 400 N.E.2d 360, 363 (N.Y. 1980); 5 FORDHAM URB. L.J. 401 (1977) *noted in* 385 N.E.2d 612, 616 (N.Y. 1978); 10 FORDHAM URB. L.J. 1 (1981) *noted in* 472 N.E.2d 765, 775 n.10 (Ohio Ct. App. 1984); 17 FORDHAM URB. L.J. 217 (1989) *noted in* 792 P.2d 1287, 1320 (Wyo. 1990); 16 FORDHAM URB. L.J. 509 (1988) *noted in* 782 P.2d 188, 189 n.8 (Utah 1989); 4 FORDHAM URB. L.J. 351 (1976) *noted in* 774 P.2d 87, 101 (Wyo. 1989); 9 FORDHAM URB. L.J. 628 (1981) *noted in* 749 P.2d 221, 237 n.8 (Wyo. 1987); 12 FORDHAM URB. L.J. 625 (1984) *noted in* 557 A.2d 372, 378 (Pa. Super. Ct. 1989); 12 FORDHAM URB. L.J. 625 (1984) *noted in* 537 A.2d 334, 348 (Pa. Super. Ct. 1988); 10 FORDHAM URB. L.J. 1, 44 (1981) *noted in* 502 A.2d 637, 648 n.12 (Pa. Super. Ct. 1985); 7 FORDHAM URB. L.J. 55, 77-83 (1980) *noted in* 425 A.2d 428, 435 (Pa. Super. Ct. 1980); 7 FORDHAM URB. L.J. 55, 77-83 (1980) *noted in* 450 A.2d 681, 683 (Pa. Super. Ct. 1982); 9 FORDHAM URB. L.J. 628 (1981) *noted in* 749 P.2d 221, 237 n.8 (Wyo. 1987); 12 FORDHAM URB. L.J. 383, 401-02 (1984) *noted in* 550 So. 2d 1074, 1076 (Ala. Crim. App. 1989); 14 FORDHAM URB. L.J. 353 (1986) *noted in* 535 So. 2d 47, 51 n.2 (Miss. 1988); 4 FORDHAM URB. L.J. 351, 362 (1976) *noted in* 498 So. 2d 814, 820 n.2 (Miss. 1986); 11 FORDHAM URB. L.J. 927 (1983) *noted in* 457 So. 2d 481, 483 n.1 (Fla. 1984); 12 FORDHAM URB. L.J. 1 (1983) *noted in* 452 So. 2d 1152, 1158 (La.

hundred sixty prestigious law reviews, texts, journals and periodicals.¹⁹⁹ This notoriety is also evidenced by the *Journal's* frequent appearance in the "Worth Reading" column of the *National Law*

1984); 10 FORDHAM URB. L.J. 1 (1981) noted in 810 S.W.2d 910, 914 (Ark. 1991); 6 FORDHAM URB. L.J. 427 (1978) noted in 662 S.W.2d 252, 256 (Mo. 1983); 7 FORDHAM URB. L.J. 55, 60-61 (1978) noted in 693 P.2d 687 (Wash. 1985); 10 FORDHAM URB. L.J. 1 (1981) noted in 1983 WL 4934 at 11 (Ohio Ct. App. 1983).

198. See *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461 (1982); *Pinter v. Dahl*, 486 U.S. 622 (1988).

199. For example, the *Fordham Urban Law Journal* has been cited at least once in each of the following law reviews, texts, journals and periodicals: AAA ARB. SEMINARS; ALI-ABA COURSE OF STUDY; ALA. L. REV.; AM. BUS. L.J.; AM. CRIM. L. REV.; AM. J.L. & MED.; AM. U. L. REV.; ARIZ. ST. L.J.; ARK. L. REV.; BARRON'S; B.C. L. REV.; B.U. L. REV.; B.Y.U. J. PUB. L.; BROOK. L. REV.; BUS. LAW.; CAL. L. REV.; CARDOZO ARTS & ENT. L.J.; CASE W. RES. L. REV.; CATH. U. L. REV.; CLEV. ST. L. REV.; COLUM. BUS. L. REV.; COLUM. HUM. RTS. L. REV.; COLUM. J. ENVTL. L.; COM. L. LETTER; CONN. L. REV.; CORNELL L. REV.; CUMB. L. REV.; DAILY LAB. REP.; DEPAUL L. REV.; DET. C.L. REV.; DRAKE L. REV.; DUKE L.J.; EMORY L.J.; ENVTL. L.; FED. COM. L.J.; FLA. L. REV.; FORDHAM L. REV.; FORDHAM INT'L L.J.; FORDHAM URB. L.J.; GA. L. REV.; GEO. J. LEGAL ETHICS; GEO. L.J.; GEO. WASH. L. REV.; HARV. C.R.-C.L. L. REV.; HARV. ENVTL. L. REV.; HARV. J. ON LEGIS.; HARV. L. REV.; HASTINGS L.J.; HOFSTRA L. REV.; HOUS. L. REV.; IND. L.J.; IOWA L. REV.; ISSUES L. AND MED.; J. MARSHALL L. REV.; J. CONTEMP. HEALTH L. & POL'Y; J. CONTEMP. L.; J. CORP. L.; J. CRIM. L. & CRIMINOLOGY; J. FAM. L.; J.L. & COM.; J.L. & HEALTH; J.L. & TECH.; KY. L.J.; LAB. L.J.; LAW OF CIV. RICO; LEGAL TIMES; LA. L. REV.; LOY. L. REV.; ME. L. REV.; MANHATTAN LAW.; MANUAL FOR COMPLEX LIT. SECOND; MARQ. L. REV.; MD. L. REV.; MD. J. CONTEMP. LEGAL ISSUES; MEM. ST. U. L. REV.; MICH. L. REV.; MIL. L. REV.; MINN. L. REV.; MO. L. REV.; NASD ARB. SEMINARS; NAT'L L.J.; NAVAL L. REV.; N.C. L. REV.; NEB. L. REV.; NEW ENG. L. REV.; N.Y. CO. ARB. SEMINAR; N.Y. L.J.; N.Y. TIMES; N.Y.U. L. REV.; NW. U.L. REV.; NOTRE DAME L. REV.; NOTRE DAME J.L. ETHICS & PUB. POL'Y; NOVA L. REV.; OHIO ST. L.J.; PACE ENVTL. L. REV.; PAC. L.J.; PEPP. L. REV.; PLI RESOLVING SEC. DISPUTES; PLI BROKER DEALER INST.; PLI ARB. SEMINAR; PRENTICE HALL SEC. ARB. UPDATE; PUB. INS. ARB. BAR ASSOC. REPT.; REAL PROP. PROB. TR. J.; RUTGERS L.J.; ST. JOHN'S J. LEGAL COMMENT.; ST. JOHN'S L. REV.; ST. LOUIS U. L.J.; ST. LOUIS U. PUB. L. REV.; ST. MARY'S L.J.; SAN DIEGO L. REV.; SANTA CLARA L. REV.; SEC. & BLUE SKY LEWIS-CLARK BOARDMAN'S ACQUISITIONS & MERGERS; SEC. & COMMODITIES REG.; SEC. ARB. COM.; SEC. ARB. PROCEDURES STRATEGIES AND CASES; SEC. REG. LAW. J.; SETON HALL LEGIS. J.; SOC. SEC. REP. SER.; S. CAL. L. REV.; S.C. L. REV.; S. ILL. U. L.J.; STAN. L. REV.; SUFFOLK U. L. REV.; SW. L.J.; SYRACUSE L. REV.; TAX LAW; TEMP. L. Q.; TEX. L. REV.; TEX. TECH. L. REV.; TORT & INS. L.J.; TOURO L. REV.; TRANSP. L.J.; TUL. L. REV.; TUL. MAR. L.J.; TULSA L.J.; U. ARK. LITTLE ROCK L.J.; U. BALT. L. REV.; U.C. DAVIS L. REV.; UCLA L. REV.; U. CHI. L. REV.; U. CHI. LEGAL F.; U. CIN. L. REV.; U. COLO. L. REV.; U. DET. L. REV.; U. FLA. J.L. & PUB. POL'Y; U. FLA. L. REV.; U. ILL. L. REV.; U. KAN. L. REV.; U. MIAMI L. REV.; U. MO.-KAN. CITY L. REV.; U. PA. L. REV.; U. PITT. L. REV.; U. TOL. L. REV.; URB. LAW.; VAL. U. L. REV.; VAND. L. REV.; VILL. L. REV.; WAKE FOREST L. REV.; WALL ST. J.; WASHBURN L.J.; WASH. & LEE L. REV.; WASH. U. J. URB. & CONTEMP. L.; WASH. U. L.Q.; WASH. L. REV.; W. NEW ENG. L. REV.; W. VA. L. REV.; W. EDUC. L. REP.; WAYNE L. REV.; WHITTIER L. REV.; WILLAMETTE L. REV.; WM. & MARY L. REV.; WIS. L. REV.; YALE L.J.

Journal.²⁰⁰ Nor is this recognition accidental or coincidental, for the depth, breadth and diversity of the *Journal's* articles are evident in the attached Appendix of its contributing authors and articles.²⁰¹

V. Conclusion

From its initial publication — twenty years ago — the *ULJ* has greatly expanded the scope and breadth of its coverage of issues. In the process, the *Fordham Urban Law Journal* staff has involved prominent practicing lawyers, judges, and academics to author its scholarly articles of the past two decades. In addition, students have increasingly become significant contributors. Indeed, the interest and enthusiasm of the outside legal community demonstrates the growing respect and esteem which the *Journal* presently enjoys.²⁰²

The past, however, “is but the beginning, and all that is and has been is but the twilight of the dawn.”²⁰³ In a changing world such as ours, the issues will surely vary as the needs and concerns also shift. The *ULJ* expects to remain viable and flexible so that in future decades and beyond it will continue to serve the needs of urban society by presenting the issues that must be addressed in a frank and articulate manner. Congratulations to the *ULJ* on its Twentieth Anniversary, and may the future reflect the excellence of its past!

200. See *supra* note 69.

201. The first part of the Appendix is sorted by the author of the article or essay, the second according to title of the comment or note, and the third part by the title of the published report.

202. See *supra* notes 197-200.

203. HERBERT GEORGE WELLS, *THE DISCOVERY OF THE FUTURE*, as quoted in JOHN BARTLETT, *BARTLETT'S FAMILIAR QUOTATIONS*, 719 (Emily Morrison Beck ed., Little Brown & Co., 15th ed. 1980).

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THEORIZING COMMUNITY JUSTICE THROUGH COMMUNITY COURTS†

Jeffrey Fagan*
and Victoria Malkin**

INTRODUCTION

Community justice practitioners argue that the justice system has long ignored its biggest clients—citizens and neighborhoods that suffer the everyday consequences of high crime levels.¹ One response from legal elites has been a package of court innovations and new practices known as “community justice,” part of a broader appeal to “community” and “partnership” common now in modern discourse on crime control.² This concept incorporates several contemporary visions and expressions of justice within the popular and legal literatures: problem-solving courts (such as drug courts, mental health courts, domestic violence courts, gun courts, and, of course, juvenile courts); the inclusion of victims and communities in the sanction process; community policing; partnerships between citizens and legal institutions; and alternative models of dispute resolution.³

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1. For a general overview, see TODD CLEAR & DAVID KARP, *THE COMMUNITY JUSTICE IDEAL: PREVENTING CRIME AND ACHIEVING JUSTICE* (1999). For a discussion on bringing the courts back into the community, see David B. Rottman, *Community Courts: Prospects and Limits*, NAT'L INST. JUST. J., Aug. 1996, at 46; see also John Feinblatt & Greg Berman, U.S. Dep't of Justice, *Responding to the Community: Principles for Planning and Creating a Community Court*, BUREAU JUST. ASSISTANCE BULL., Nov. 1997, at 1-9, available at <http://www.ncjrs.org/pdffiles1/bja/185986.pdf> (last visited Mar. 15, 2003).

2. See ADAM CRAWFORD, *THE LOCAL GOVERNANCE OF CRIME: APPEALS TO COMMUNITY AND PARTNERSHIPS* 4-7 (1997).

3. See COMMUNITY JUSTICE: AN EMERGING FIELD 327, 330 (David Karp ed., 1998); see also ERIC LEE, U.S. DEP'T OF JUSTICE, COMMUNITY JUSTICE SERIES No. 2, COMMUNITY COURTS: AN EVOLVING MODEL 3-4 (2000), available at http://www.courtinnovation.org/pdf/community_courts_evolution_model.pdf (last visited Mar. 15, 2002).

For court reformers, the conceptual ground and animating thought for problem-solving courts is that the system is broken, overloaded, and ineffective.⁴ Community justice projects go beyond the problem-solving court model to create legal institutions that bring citizens closer to legal processes.⁵ What separates community justice from the recent creation of specialized parts is the prospect of mutual accountability between courts and community, and the importance of local space in defining the types of problems that present themselves for socio-legal solution.⁶

Unlike treatment courts or problem-solving courts, community courts seek to fix problems in the courts by developing legal forums that are unique in three ways. First, these institutions bring citizens and defendants closer in a jurisprudential process that is both therapeutic and accountable. Legal responses to families and individuals with multiple legal problems are coordinated, and ideally, unified. Some community courts are multi-jurisdictional courts that link typically separate court parts into one location and under one administrative umbrella. Second, community justice centers and community courts link service providers to the court and, in turn, to families in a way that is responsive to their perceived needs. It brings the court closer—both physically and administratively—to the social and behavioral origins of the problems that it seeks to address, and it seeks to bring services to bear on these problems under the administrative aegis of the court. Third, these justice centers bring the courts and their service adjuncts into a community with limited access to both public and private services. The physical presence of the court in a community signals that the relationships of citizens and communities to courts differ in meaning, tone, and content. These courts are relatively new, and

4. See MICHELE SVIRIDOFF ET AL., CTR. FOR COURT INNOVATION, DISPENSING JUSTICE LOCALLY: THE IMPLEMENTATION AND EFFECTS OF THE MIDTOWN COMMUNITY COURT1-2 (2001), available at http://www.courtinnovation.org/pdf/disp_just_loc.pdf (last visited Mar. 15, 2003).

5. Anthony C. Thompson, *Courting Disorder: Some Thoughts on Community Courts*, 10 WASH. U. J.L. & POL'Y 63, 83-92 (2002).

6. "Community courts are neighborhood-based courts that use the power of the justice system to solve local problems. These courts seek to play an active role in the life of their neighborhoods, galvanizing local resources, and creating new partnerships with community groups, government agencies, and social service providers." John Feinblatt et al., *Neighborhood Justice at the Midtown Community Court*, in CRIME AND PLACE: PLENARY PAPERS OF THE 1997 CONFERENCE ON CRIMINAL JUSTICE RESEARCH AND EVALUATION 81 (Nat'l Inst. of Justice ed., 1998).

until now, have received neither research attention, nor jurisprudential analysis⁷

This Article reports on research on a community court that is part of the Red Hook Community Justice Center in Brooklyn, New York.⁸ Red Hook is a neighborhood in Brooklyn with a long and rich history of both fortune and misfortune.⁹ The neighborhood today is an area in transition, challenged by social deficits such as crime and drugs.¹⁰ Red Hook also is a neighborhood with weak services and economic institutions, which are further strained by competing claims for primacy and attention.¹¹ Furthermore, Red Hook's physical location isolates it socially from other parts of Brooklyn and New York City.¹²

One of the recurring crises in Red Hook, and many socially and economically disadvantaged neighborhoods, is the low rating by citizens of the legitimacy of law and legal institutions.¹³ Problems in both distributive and procedural justice, plus the failure of courts and other government programs to provide public safety and material well-being, have created a breach between citizens and government that is reflected in citizens' reactions to legal institutions. In Red Hook, the police and the courts historically have not been citizens' allies in their struggle for safety.¹⁴

7. Thompson, *supra* note 5, at 92-99. The most comprehensive community court research examined the Midtown Community Court. See SVIRIDOFF ET AL., *supra* note 4, at 1-2.

8. The term "community court" is used to refer to the legal processing of cases that occurs within the RHCJC, and to the "community justice center" when referring to its community development activities. See, e.g., Alex Calabrese, "Team Red Hook" Addresses Wide Range of Community Needs, 72 N.Y. ST. B.J., June 2000, at 14, available at http://www.nysba.org/Content/NavigationMenu/Attorney_Resources/Shop/Bar_Journal/calabrese.pdf (last visited Mar. 15, 2003).

9. See Philip Kasinitz & Jan Rosenberg, *Missing The Connection: Social Isolation and Employment on the Brooklyn Waterfront*, 43 SOC. PROBS. 180,183-84 (1996); see also Aaron Donovan, *If You're Thinking of Living in Red Hook: Isolated Brooklyn Area Starts to Awaken*, N.Y. TIMES, June 10, 2001, § 11, at 7.

10. See *infra* Part II.B.

11. See Kasinitz & Rosenberg, *supra* note 9, at 182-86.

12. See Donovan, *supra* note 9, § 11, at 7; see also N.Y. City Dep't of City Planning, Community District Profiles, available at <http://www.nyc.gov/html/dcp/html/lucds/bk6lu.html#data> (last visited Mar. 15, 2003).

13. TOM R. TYLER & YUEN J. HO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS 108-11 (2002); Robert J. Sampson & Dawn Jeglum Bartusch, *Legal Cynicism and (Subcultural?) Tolerance of Deviance: The Neighborhood Context of Racial Differences*, 32 LAW & SOC'Y REV. 777, 799 (1998).

14. Christopher Ketcham, *Roach Motel*, SALON, Oct. 17, 2002, at http://archive.salon.com/mwt/feature/2002/10/17/jail_time/index_np.html (last visited Mar. 15, 2003). This article describes a man the author met in his cell block as:

Accordingly, the Red Hook Community Justice Center (“RHCJC” or “the Court”) focused its attention on the role of law and legal institutions in public safety.¹⁵ The creation of a court physically closer to the community, more responsive to the problems that give rise to crime, and accountable to the community to reduce crime and deliver remedial services, offers the Court a transformative role that will involve citizens in the processes of social regulation and control that are essential to crime prevention and justice.¹⁶ This is the theoretical challenge for problem-solving courts generally, and decentralized community-based courts in particular.

This Article theorizes the structure and process of community justice, focusing on the model offered by community courts. We examine how the Red Hook Community Justice Center’s development and implementation are the products of its immersion in the intersection of social, spatial, and political dynamics within the Red Hook neighborhood. Its creation was also influenced by the broader context of court innovation in New York, and local crime policies and problems in the city. The development of various forms of community justice has been under-theorized, despite the rapid expansion of community justice experiments and the broader acceptance of a new role for courts to attack specific manifestations of crime. Theory matters in this context, offering a causal story about the underlying dynamics of change, and identifying potentially enduring and generalizable lessons that help us predict whether the practices that are promising in one place would be equally effective in another.

This Article begins by reviewing the sociological perspectives that converge in the historical development of “community justice.”¹⁷ Community justice developed not just as a response to the concerns about legitimacy facing contemporary legal institutions, but also as part of a changing narrative of social control in areas undergoing rapid social structural change.¹⁸ We set forth a frame-

Rousted on a spurious charge—misdemeanor possession—and now the creep was off the streets of my hometown neighborhood of Red Hook, in Brooklyn, lodged safely here in the cinderblock ugliness that is the 76th Precinct of the NYPD, and toiled over by cops and clerks and DAs who know, if they have a conscience, that driving a man like chattel just because he carries a syringe doesn’t make sense.

Id.

15. See LEE, *supra* note 3, at 18.

16. See *infra* Part II.D.

17. See *infra* Parts I.A & I.B.

18. See *infra* Part II.D.

work of social regulation and control that shapes the internal workings of these new legal institutions, and also influences their relations with the communities that host them.¹⁹ Next, we identify challenges facing community justice centers and community courts in their efforts to reconcile a complex vector of institutional, social, and political dynamics.²⁰ The Article concludes by revisiting the conceptual frames of these courts, and locating their historical development in broader themes of the role of legal institutions in rapidly changing social contexts.²¹

I. THEORIZING COMMUNITY JUSTICE

The dissatisfaction of individuals who suffer the consequences of rising crime levels and/or social disorder, which makes their everyday lives unsafe, created a crisis of legitimacy for legal institutions. Much of this discontent centered on the courts.²² This pressure motivated reformers to create more accessible and effective judicial forums with the aim of solving local problems.²³ Although public dissatisfaction put policy makers and local government on alert, the movement towards a community justice model as the solution originated among leaders within the criminal justice system. These practitioners, especially judges, now see themselves as the champions behind these new legal experiments bracketed under a "community justice model" as they aim to improve the "quality of justice" delivered by the system.²⁴

Community justice practitioners justify these changes through their real experience of a "crisis"²⁵ in the court system. This crisis is defined by a system that is overloaded and unable to respond efficiently or thoughtfully to its caseloads. Practitioners point to their daily caseloads to infer that the system no longer works. They

19. See *infra* Part I.C.

20. See *infra* Parts I.C & I.D.

21. See *infra* Part III.

22. See Greg Berman & John Feinblatt, *Problem-Solving Courts: A Brief Primer*, 23 LAW & POL'Y 125, 128 (2001), available at http://www.courtinnovation.org/pdf/prob_solv_courts.pdf (last visited Mar. 15, 2003).

23. See JOHN BRAITHWAITE, *RESTORATIVE JUSTICE & RESPONSIVE REGULATION* 46-47, 91 (2002); see also Leena Kurki, *Incorporating Restorative and Community Justice into American Sentencing and Corrections*, in *SENTENCING AND CORRECTIONS: ISSUES FOR THE TWENTY-FIRST CENTURY* 1-2 (U.S. Dep't of Justice ed., 1999).

24. CLEAR & KARP, *supra* note 1, at 5; see JAMES F. NOLAN, JR., *REINVENTING JUSTICE, THE AMERICAN DRUG COURT MOVEMENT* 5, 108-10 (2001); Greg Berman, *What is a Traditional Judge Anyway? Problem Solving in the State Courts*, 84 JUDICATURE 78, 80 (2000); Sarah Glazer, *Community Prosecution: Should Prosecutors Try to Solve Local Problems*, 10 CQ RESEARCHER 1009, 1009-32 (2000).

25. See Berman, *supra* note 24, at 80.

highlight the high levels of recidivism, the “revolving door,” and the increasing levels of incarceration to assert that the “system is broken.”²⁶ The reorganization of the justice system toward a community justice ideal has been animated, therefore, by both the external pressures coming from citizens who want a more accessible and effective legal form, and by internal pressure and dissatisfaction brewing within the courts. Each of these sources of discontent contributed to a crisis of legitimacy, motivating judges, local governments, and other agencies to become more receptive to experimentation within the court system. These circumstances and changes are discussed further below.

A. Crime, Courts, and Legitimacy

Over the past two decades, economic, political, and social changes have led the courts onto the frontline of managing policy issues—such as the war on drugs, the crisis of gun violence, and quality of life campaigns—in ways that the legal system has not previously experienced.²⁷ At the same time, structural issues of size, management, and bureaucracy have affected the system, causing increased inefficiency and inflexibility.²⁸ This growth occurred in an era when local and national cost cutting have left both courts and police departments badly equipped.²⁹ Finally, criminal courts are faced with high numbers of offenders who have been adversely affected by social service cuts, such as the mentally ill, the homeless, and those addicted to drugs.³⁰

Community justice reconceptualizes the judicial branch. It is no longer an impartial arbiter of state power, but instead seeks to serve a victimized community that is in need of repair. The judicial branch now becomes an activist pressing for social transformation and neighborhood healing. It pushes for the mobilization of social services under the auspices of the court, and for new forms of de-

26. *Id.*; see NOLAN, *supra* note 24, at 108-10; John Feinblatt et al., *The Future of Problem-Solving Courts*, 15 CT. MGR. 28, 29 (1999).

27. See DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 193-205 (2000).

28. See *id.* at 87-89.

29. See *id.* at 81-82. Investments in criminal justice services in New York State, however, have grown in the past decade. The New York State Office of Court Administration budget has grown each year for the past seven years. See Division of Financial Management: Budget and Fiscal Operations, New York State Unified Court System, Judiciary Budget, *available at* http://www.courts.state.ny.us/Budget/Budget_docs.htm (last visited Mar. 15, 2003). The New York City Police Department budget doubled in size, after adjusting for inflation, from 1994-2000.

30. See GARLAND, *supra* note 27, at 75-76.

liberative democracy where transparent information becomes an engine for reshaping power relations between citizens and courts.³¹

From the outside, much of the “community justice model” from drug courts and mental health courts to restorative justice and the new “sanctioning circles”³² can be read as an attempt by the criminal justice system to respond to these challenges. The courts are now asked to manage the outcome of different social policies. These policies range from social services cuts that lead to increases in the numbers of homeless and mentally ill people on the street, to increased arrests that put these same individuals in the courts’ charge while leaving the court with limited tools to do anything but incarcerate or release them. These challenges have led judicial leaders and criminal justice officials to integrate legal and social services under the umbrella of community justice, even as they are faced with challenges to their own legitimacy.

Advocates for community justice state that their responses are motivated by real issues and less by theoretical debates, the real issue being that something is not working and needs to be fixed. But the underlying reasons for this inefficiency are more complex than an organizational malfunction—something implicitly alluded to by community justice advocates who argue that this model “aims to fix underlying problems.” The idea of a broken system, a system that relies on increasing levels of coercion without a corresponding reduction in crime,³³ suggests that it is not the court system alone that is the problem. Indeed, the very growth in arrest numbers, many for small nonviolent crimes, and the push for quality-of-life arrests suggests that the system requires these explicit demonstrations of force and coercion to maintain social order. That is, crime

31. See Michael C. Dorf & Charles E. Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 831, 832-38 (2000).

32. Proponents of restorative community justice contend that the community, like the state and the victim, has a stake in justice that should be acknowledged and nurtured. The restorative justice model calls for both individual and community restitution to pay back the victims of crime and restore the community. BRAITHWAITE, *supra* note 22, at 10-12. This model calls for victim impact panels to educate offenders about the effects of their actions on victims and communities. *Id.* at 47-50. Furthermore, it supports family group conferencing to resolve issues that might otherwise come before courts. *Id.* at 66. The restorative justice model also suggests rehabilitation programs, in order to help offenders reconstruct their lives. *Id.* at 95-96; see Seamus Miller & John Blackler, *Restorative Justice: Retribution, Confession, and Shame*, in RESTORATIVE JUSTICE: PHILOSOPHY TO PRACTICE 77, 77 (John Braithwaite & Heather Strang eds., 2000).

33. Jeffrey Fagan & Garth Davies, *Policing Guns: Order, Maintenance and Crime Control in New York*, in GUNS, CRIME, AND PUNISHMENT IN AMERICA (Bernard Harcourt ed., forthcoming May 2003) (manuscript at 6-7, on file with authors).

is being controlled through formal, as opposed to informal, social control.

While formal social control may be one mechanism for enforcement, the ideal is that compliance will be voluntary, something that is more likely when individuals consider the law and its accompanying legal institutions to be fair, effective and legitimate.³⁴ Excessive noncompliance suggests that the law or its enforcers may be seen as illegitimate, something that is ultimately counterproductive at the social and economic level:

[L]egitimacy is significant not only for the maintenance of order, but also for the degree of co-operation and quality of performance that the powerful can secure from the subordinate; it is important not only for whether they remain in power but for what their power can be used to achieve In effect, the advantage of legitimacy is that a legitimate system can accrue enhanced order, stability, and effectiveness. While order, stability, and effectiveness can be achieved through other means, such as coercion alongside effective organizational capacity, legitimacy allows for the legitimization of power through moral forces and affects the attitudes and behaviors of the agents as moral agents.³⁵

In other words, a legitimate system in the long run is not only more cost effective and efficient (in market terms), but also at the level of social organization, it enables the powerless to be moral agents who are instrumental in the system's survival. This is quite different from the logic of the traditional hierarchical courts, where the powerless are imagined as responding in their own self-interest, to which the system responds in turn by imposing its own vision of a greater good. In the realm of legal institutions and the criminal justice system, the system is at its most stable when its power is utilized for a "public" good, while simultaneously engendering its own legitimacy. In this dynamic, the criminal justice system not only remains a positive representative of the state and its power, but also it leverages and promotes informal social control as individuals increasingly comply with the law, even in the face of laws with which they do not agree.³⁶ Furthermore, it becomes increasingly clear that without legitimacy, the system relies on increased

34. TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 22-30 (1990). Tyler finds that people are more likely to obey the law, even if they may not agree with a particular law, if they have had a positive experience with the law and they perceive the law to be legitimate. *Id.*

35. DAVID BEETHAM, *THE LEGITIMATION OF POWER* 29, 33 (1991).

36. TYLER, *supra* note 34, at 27-30.

law enforcement, sanctions, and incarceration, all of which become more costly, time consuming, and inefficient in terms of overall system stability. Such a system is not sustainable over time.

This reading of the “crisis” in the system highlights that outside of the ethical imperatives underlying the community justice movement (such as helping addicts, mentally ill, and others who have ended up under their jurisdiction and/or restoring community), the impetus to reorganize stems from a current “crisis” that challenges the very legitimacy of the courts.³⁷ The community justice model, in trying to fix the system, is trying to ensure that legal institutions remain legitimate as they maintain social order and public safety by reaching a systemic equilibrium of reciprocal and mutually reinforcing social controls.

B. Community Justice and the Search for Collective Action and Accountability

The application of community justice inside the judicial process, as opposed to the correctional system or policing, sees the court as more than an institution that uses the adversarial system to guarantee an individual’s right against the power of the state.³⁸ The courts and individuals no longer act alone, as the community justice model adds a third component—the community.³⁹ Courts now refocus their vision onto the communities whose members restrict their daily practices because of crime levels (real or perceived). In this theoretical perspective, the courts are present within a larger network, comprised of the court, civil society, and residents who will work towards the common good of the community.⁴⁰ Commu-

37. CLEAR & KARP, *supra* note 1, at 1-2.

38. *Id.* at 20-21.

39. *Id.*

40. *Id.* at 75. There is no rigorous definition of the term “community” and its limits, or the idea of “community” definitions within the community justice model. Clear and Karp use it to cover anything from an occupational group, ethnic affiliation, or voluntary associations alongside neighborhoods. *Id.* at 59-60. This Article does not address this issue, but it is worth asking why all these different groupings and networks are being classified as a “community,” and whether putting any particular group into a community is a sound basis for classifying it as community justice. See Gordon Bazemore, *Issues, Themes, and Questions for the New Neighborhood Sanctioning Models*, in COMMUNITY JUSTICE: AN EMERGING FIELD, *supra* note 3, at 342-44. Professor Bazemore discusses four different “community justice” models and shows how, in each one, the project has defined community according to its scope—from immediate victim, to victim and her family, to community leader, and finally to residents of a local space. *Id.* at 344-47, 351, 356-57. Bazemore also does not question this as one of the problematic issues within the community justice movement. *Id.* at 353-54. He does, however, point out that not all communities necessarily aspire or

nity courts are an important facet of the community justice movement, and are springing up throughout the United States.⁴¹ At the practical level, the community court proposes several ways in which it can benefit a neighborhood. It brings the court and its service adjuncts into a community with limited access to public and private services. By placing the court into the neighborhood, it brings the court closer—physically and administratively—to the social and behavioral origins of the problems that it seeks to address.⁴² It aims to bring services to bear on these problems under the administrative aegis of the court. Meanwhile, the physical presence of the court in a community signals that the relationships of citizens to courts and communities to courts differ in meaning, tone, and content.⁴³

Community courts have introduced a variety of mechanisms to respond to both theoretical and practical challenges they face, as they aim to create and augment their legitimacy:

1. *Individualized Justice*

Community courts focus at the level of the individual to counteract some of the social sources of crime—such as low levels of human capital, addiction problems, and other medical and social needs.⁴⁴ This is done by linking up individuals to different social services from treatment programs to employment training. They cater their sanctions to individuals and their needs and in this way hope to reduce the motivation or propensity for criminal behavior.

2. *Restorative Justice*

Alongside personalized sanctions, the new courts work to apply restorative justice. This means devising sanctions and processes that help both the victim's and the community's needs.⁴⁵ In many cases, the victim is understood to be the entire community, which may now gain material help, such as community service crews to undertake neighborhood projects—from park clean-ups to graffiti

idealize their participatory role in crime control, and that this can vary according to social, economic, and cultural factors. *Id.*

41. See BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, OVERCOMING OBSTACLES TO COMMUNITY COURTS: A SUMMARY OF WORKSHOP PROCEEDINGS iii (1998), available at <http://www.ncjrs.org/pdffiles1/173400.pdf> (last visited Mar. 15, 2003); see also LEE, *supra* note 3, at iii; Thompson, *supra* note 5, at 63.

42. See LEE, *supra* note 3, at 3.

43. See *id.* at 7.

44. See CLEAR & KARP, *supra* note 1, at 167-71; see also LEE, *supra* note 3, at 6.

45. See Bazemore, *supra* note 40, at 336.

removal. The victim could also be an individual whose interests are taken into account when a judge imposes a sanction (such as in assault and domestic violence cases).

3. *Moral Communication*

The physical existence of a problem-solving court or community court sends a signal to the community and/or the offenders that certain illegal and antisocial behaviors are not acceptable and that the law and legal institutions are working to prevent these behaviors.⁴⁶

4. *Creating Partnerships*

The courts, working in conjunction with social service agencies, community groups, schools, parent-teacher associations, churches, and other organizations, can create partnerships that will work to strengthen the community and advance the broader goals of the agencies or the community groups.⁴⁷ In this way, the legal institution is no longer separate and alienated from the communities with which it works. These partnerships are seen as a way to enhance the flexibility of the court system and its ability to respond to the particular needs of both individuals and neighborhoods.⁴⁸ The community is envisioned as an integral part of the process. Ideally, the “community” should also see itself as having “ownership” over the legal institution.⁴⁹ Furthermore, the creation of partnerships with the community, either through formal mechanisms (community groups and other social service agencies, and advisory boards) or informal mechanisms (individual relationships) integrate the court into the community’s social networks, and ensure that the court remains more accountable to its clients.⁵⁰

Community courts aim to ensure that there is an accretion of positive experiences for those individuals who encounter the courts.⁵¹ This includes both the offender population that benefits from this new form of “therapeutic jurisprudence” and other groups working in partnership with the courts.⁵² These processes and their positive outcomes are communicated to the community

46. *See id.* at 336-37.

47. *See, e.g.,* Berman & Feinblatt, *supra* note 23, at 4-5.

48. *See* Bazemore, *supra* note 40, at 337.

49. *See* LEE, *supra* note 3, at 7.

50. *See* Bazemore, *supra* note 40, at 337.

51. *See* LEE, *supra* note 3, at 7.

52. *See* CRAWFORD, *supra* note 2, at 119-23; *see also* Berman & Feinblatt, *supra* note 23, at 136-37.

at large through both direct and vicarious processes of social transmission or contagion that spread across social networks.⁵³

C. Community Courts and Social Regulation

To address the second dimension of legitimacy—compliance and embracing of the social norms of the law—community courts must address the quality of justice that comes with this new judicial forum. Community justice centers become desirable options only if they are truly more than just an efficient mechanism to deliver social services to a needy population and/or supply different social service projects to different neighborhoods. If this is their sole achievement, then one could advocate providing services without the court, thus avoiding the major overhaul and cost of reorganizing the legal system. Not only is this cheaper, but it may also benefit the community more, as those people who are reluctant to enter a court to seek help may prefer to seek help through service agencies that are free standing.

Community courts have to provide new forms of justice, both through the courtroom and other court initiatives. Both should be visible and available for the community. At the theoretical level, community courts should render the court accountable to local individuals and groups. Even when crime is the result of macro-level determinants (such as poverty or poverty housing) the community court model assumes that these problems will be differentially distributed and manifested in different ways across a local social, economic, and political space. The local space determines the types of problems that present themselves for a socio-legal solution and specific solutions are usually perceived at the local social and political level. Community courts can address localized crime and other local problems, such as drinking in a specific park, drugs in a specific building, or prostitution on a specific street.⁵⁴ Unlike treatment courts and other problem-solving courts, community courts seek to fix problems in the courts and in the outside community by developing legal forums that are uniquely configured towards its particular crimes and social problems.⁵⁵ Accountability takes place

53. See, e.g., JACK BALKIN, *CULTURAL SOFTWARE* 90-96 (1997); AARON LYNCH, *THOUGHT CONTAGION* 1-16 (1996); see also Ronald Burt, *Social Contagion and Innovation: Cohesion Versus Structural Equivalence*, 92 AM. J. SOC. 1287, 1288-89 (1987).

54. See, e.g., CLEAR & KARP, *supra* note 1, at 169-70 (describing how Bryant Park in Manhattan, formerly a haven for drug-dealers, was successfully transformed physically as a result of community initiatives).

55. See, e.g., Rottman, *supra* note 1, at 48-50 (describing different models for community-focused courts); Thompson, *supra* note 5, at 88-92.

as the court's focus and outcomes are determined by the space in which the court operates.

On the flip side of this new triad of court-community-service providers is the assumption that the people whose quality of life is affected by crime can be mobilized in such a way that their participation will enhance and complement the role of the criminal justice system. That is, community justice centers assume that many people who commit crimes of particularized concern in the court's local space can be rehabilitated, and that once rehabilitated, those people who are residents or victims can exert a form of informal social control that will ultimately reduce crime.⁵⁶

This assumption stems from the fact that fear of the legal system does not promote compliance in neighborhoods with high crime rates.⁵⁷ Social ties among citizens and their dynamic expressions of social control contribute in separate and different ways from legal control to produce lower crime rates.⁵⁸ While participation and partnerships with local communities can vary—from using them to help enforcement (as when you ask the residents to inform the police and the courts about “hot spots”), to determining sanctions—the ideal is that community courts can bring citizens and defendants closer in a jurisprudential process that is at once therapeutic and accountable.

D. Local Problems, Community Justice, and Legitimation

Through their creation, community courts can address problems that centralized courts cannot. For example, some community courts and community justice centers can link typically separate court parts (such as family courts, housing courts, and criminal courts) into one location and under one administrative umbrella.⁵⁹ In this way, legal responses to families and individuals with multiple legal problems are coordinated and, ideally, unified. Also, community courts can respond to community “problems” that are

56. See, e.g., N.Y. Ass'n of Pretrial Serv. Agencies, Red Hook Community Justice Center (stating that through community restitution, the Justice Center will make justice more visible and tangible to local inhabitants), at http://www.nyapsa.org/red_hook_community_justice_center.htm (last visited Mar. 15, 2003).

57. See, e.g., ROBERT J. BURSIK, JR. & HAROLD G. GRASMICK, NEIGHBORHOODS AND CRIME 1 (1993); Robert J. Sampson et al., *Neighborhoods and Violent Crime: A Multilevel Model of Collective Efficacy*, 277 SCIENCE 918, 918-24 (1997), available at http://www.sactaqc.org/Resources/Literature/Neighborhood_Vitality/Neighborhoods_and_Violent_Crime.htm (last visited Mar. 15, 2003).

58. Sampson et al., *supra* note 57, at 1-2.

59. See, e.g., LEE, *supra* note 3, at 18.

normally considered as nuisances or “victimless” crimes—such as loud noise, graffiti, illegal vending, prostitution, and public urination—problems that typically do not command the attention of centralized courts. These are crimes that affect specific neighborhoods and that have specific consequences.⁶⁰ Ideally, community courts redefine these crimes as problems for the community, an evaluation that is quite different from its scale within a formal legal framework.⁶¹

These practical strategies, such as providing new services and responding to local problems, are one part of the community court’s response to the crisis of legitimacy of both the law and the legal system at the local level. These localized courts can now seek to both reestablish their legitimacy, and through this, encourage the informal mechanisms of social control that will reduce crime and improve a community’s quality of life. The larger goal of engendering legitimacy is one of the few ways that a court can cement its role in improving public safety within a local space without resorting to increased use of coercive force and social control.

For a court to take on this new role, it has to create new partnerships; it cannot control crime alone. But the court is in a double bind; that is, the partnerships with the community can only emerge if the groups (or “partners”) within the community perceive the legal actors and the court to be a legitimate institution. If not, the groups will at least have to see the partnership as being to their benefit for some other reason—the community court could be used as an access to resources that citizens lack.⁶² Community courts

60. See WESLEY SKOGAN, *DISORDER AND DECLINE* 168-69 (1990) (explaining how the lack of organized community participation in disorderly neighborhoods further impairs the capacity of residents to help themselves); RALPH B. TAYLOR, *BREAKING AWAY FROM BROKEN WINDOWS* 136-37 (1998) (criticizing the shift within the court system from focusing on community rights to individual rights of the “homeless, panhandlers, and others”); Robert J. Sampson & Stephen W. Raudenbush, *Systematic Social Observation of Public Spaces: A New Look at Disorder in Urban Neighborhoods*, 105 AM. J. SOC. 603, 612-13 (2000).

61. See, e.g., LEE, *supra* note 3, at 9-18 (describing various community courts and what they share in practice). While writers such as Lee see these courts as focusing on quality-of-life issues that nag communities and invite more serious crime, this is a limited perspective that fails to establish a comparative advantage for community courts. To truly depart from regular court parts, drug treatment courts, or other specialized parts, community courts have to be focused on a specific location and guided by the partnerships formed with individuals and groups in this space.

62. See BEETHAM, *supra* note 35, at 29-32. Beetham argues that for power to be maintained, it has to gain the consensus of those who are ruled. *Id.* In many cases this is obtained by getting active consent from various strategic representatives, as most often this consent will give the subordinate access to resources they lack or other

need to consider this bind as they enter into neighborhoods and form partnerships. This is a major challenge facing the court in its quest to transform itself into a legitimate social actor.

The above discussion highlights the underlying goals that are essential for both the community justice ideal in general and community courts in particular. While different legal experiments may envision different or multiple paths to legitimacy, their shared final goal is to be seen as legitimate actors who can enlist and enable a community in their own practices that encourage informal social control. Now, empirical evidence is necessary to assess whether courts can accomplish this end. Such evidence should be considered through two vantage points. The first is what are the successes and challenges in the implementation of the practical strategies that are part of the community court as an operating model (for example, designing an efficient and effective treatment program, creating a multi-jurisdictional courtroom, and choosing partners and working with them). Second, and more importantly, is whether those practical strategies adopted by a community court, even when successful within the specific parameters of a court's goal, are the practical strategies necessary to engender legitimacy within a particular community, and thus achieve the broader goals that underlie the community justice model in general, and the community court in particular.

II. LEGITIMACY AND COURT INNOVATION: THE RED HOOK COMMUNITY JUSTICE CENTER

The research for this Article was designed to describe and explain how the Red Hook Community Justice Center faced its organizational, political, and legal challenges. While the Article acknowledges most of the practical or operational problems that could hinder the function of the Court as a social institution, it focuses on several theoretical assumptions and practical problems that challenge the role of this Court as an institution that can engender legitimacy in a community. This Article illustrates some of the obstacles to legitimacy faced by the RHCJC both before and after its arrival in Red Hook.

benefits. *Id.* Without this consent, it is impossible for power to be seen as legitimate. *Id.*

A. Research Methodology

The research for this Article took place from October 2000 to December 2001. The principle method was ethnographic study that included several elements: participant observation in the courts and the surrounding neighborhoods, regular attendance at community meetings, interviews with defendants, court employees, other representatives of the criminal justice system both inside and outside of the court, and community residents. One of the Authors (Malkin) attended operations meetings of the RHCJC "team." These meetings were organized in the court to monitor defendants and court cases, as well as other matters related to court operations. She went to several sanctions groups, such as the marijuana groups and the quality of life groups, as well as the job training and treatment readiness programs, so that she could become familiar with their content and observe the defendants' responses. She also regularly attended the Red Hook public housing tenant association meetings for Red Hook Houses, Red Hook Civic Association Meetings, meetings at the Seventy-Sixth police precinct, and other community meetings as they arose. She had frequent informal interviews with large numbers of court employees, visitors, and defendants in the courts, and neighborhood residents. These events were recorded during the research period through ongoing field notes.

Malkin also conducted open-ended formal interviews, which were taped and transcribed with fifty-nine individuals and thirteen community service crews in the courts. These individuals represent a variety of perspectives and experiences in the neighborhood and inside the court. Interviews ranged in length from thirty to ninety minutes. Most individuals were interviewed after Malkin had met the individual several times through her regular presence in the neighborhood and court. While the set of interviews may not be a representative sample, the ethnographer's prior knowledge of the neighborhood, the context, and the individual (in some, but not all cases) allowed for a great deal of openness and frankness. In each interview a series of general themes were discussed; for individuals involved with the court (as employees, defendants, or voluntary users), respondents discussed the idea of the court, its function, and performance. Interviews then went on to discuss more general ideas about the police, crime, and problem solving. For neighborhood residents, interviews asked about neighborhood history, law and order, police activity, and attitudes towards crime and problem solving.

For this period of participant observation, field notes were kept and observations were recorded. At the end of the field period, the taped interviews were all coded in a qualitative database and analyzed according to the various themes that emerged. This ethnographic method builds on the deductive experience of spending long periods of time in a field site, and conclusions are based on empirical observations. While the interviews cannot be seen to represent a sample population, they capture a wide range of different views within the community. What this method sacrifices in terms of sample and quantitative method, it gains through the ongoing presence of the researchers and their presence at specific events, moments and conflicts which can then be followed over time.

This qualitative methodology has a long history in anthropology, sociology, and other social sciences, and follows a rich tradition of community studies.⁶³ More recently, legal anthropologists have used these methods to explain the interactions of individuals with legal actors and institutions, to identify the meanings and categories that citizens use to evaluate these interactions, and to understand how law as an institution behaves toward individuals. For example, Professors Patricia Ewick and Susan Silbey studied the transactions of ordinary citizens with civil, criminal, and administrative components of law.⁶⁴ Similarly, Professors John Conley and William Barr,⁶⁵ Sally Merry,⁶⁶ and Laura Nader⁶⁷ have all used qualitative research and variations of the ethnographic method to understand how legal institutions and the law are actually understood and received by those who use the law. This ethnographic method is essential for the study of a court within a community that seeks to address community issues and integrate into the social relations of a community. The conclusions reached in this Article are based on this long, cumulative process, much of this a method of "being there." This is a recognized method required to reach reliable, in-depth understandings of processes and social relations that are often missed in quantitative research.

63. See generally CLIFFORD GEERTZ, *INTERPRETATION OF CULTURES: SELECTED ESSAYS* (1973).

64. See generally PATRICIA EWICK & SUSAN SILBEY, *THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE* (1998).

65. See generally JOHN M. CONLEY & WILLIAM M. O'BARR, *RULES VERSUS RELATIONSHIPS: THE ETHNOGRAPHY OF LEGAL DISCOURSE* (1990).

66. See generally SALLY MERRY, *GETTING JUSTICE, GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING CLASS AMERICANS* (1990).

67. See generally LAURA NADER, *NO ACCESS TO LAW* (1980).

B. Origins of the Red Hook Community Court

Red Hook is a geographically and socially isolated community of low-income families.⁶⁸ It is cut off from other nearby Brooklyn neighborhoods by a large expressway, whose construction decades ago was contested by community residents who foresaw the adverse consequences of cleaving the area from its residential surroundings.⁶⁹ Surrounded by water on its other three sides, the Red Hook population fell from more than 22,000 people in the 1950s, to an estimated 11,000 in 1990.⁷⁰ According to the 2000 Census, the median household income in the four census tracts comprising Red Hook was \$27,777,⁷¹ well below the New York City median of \$38,293.⁷² More than seventy-eight percent of the children in Red Hook live in households lacking one or both natural parents;⁷³ 29.2 percent fall below the poverty level,⁷⁴ compared to 21.2 percent citywide.⁷⁵ Fewer than half the persons over twenty-five years of age are high school graduates,⁷⁶ and fewer than ten percent of this same population group have college degrees;⁷⁷ nearly thirty percent of the working-age men in Red Hook are unemployed.⁷⁸ Approximately 8,000 of Red Hook's 11,000 residents (approximately seventy percent) live in the Red Hook Houses,⁷⁹ one of New York's largest and oldest public housing projects in the city.

Once a busy waterfront neighborhood, the decline in the shipping industry in New York City meant that Red Hook suffered the

68. See generally KENNETH JACKSON & JOHN MANBECK, *THE NEIGHBORHOODS OF BROOKLYN* (1998). See also Donovan, *supra* note 9, § 11, at 7; Kasinitz & Rosenberg, *supra* note 9, at 182.

69. Donovan, *supra* note 9, § 11, at 7.

70. See Kasinitz & Rosenberg, *supra* note 9, at 182.

71. Red Hook is a neighborhood comprised of four census tracts: 0055, 0057, 0059, 0085. See N.Y. City Dep't of City Planning, Political and Administrative Districts, Census Tracts, at <http://www.ci.nyc.ny.us/html/dcp/html/bytes/dwndistricts.html#cbt> (last visited Mar. 15, 2003). Social and economic indicia for Red Hook from 2000 U.S. Census data for each of the constituent census tracts. See U.S. Census Bureau, 2000 Census Pub. L. No. 94-171 File & STF1 Files; see also N.Y. City Dep't of City Planning, Population Division, Demographic Tables [hereinafter N.Y. City Dep't of City Planning, Demographic Tables] (providing tables for the 2000 Census Tables for New York City), available at <http://www.ci.nyc.ny.us/html/dcp/html/census/poptable.html> (last visited Mar. 15, 2003).

72. N.Y. City Dep't of City Planning, Demographic Tables, *supra* note 71.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. Kasinitz & Rosenberg, *supra* note 9, at 183.

consequences of deindustrialization and job losses that were the mainstay of much of the neighborhood.⁸⁰ It is a mixed-use neighborhood whose older private houses are leading the way towards a (contested) transition into a residential neighborhood.⁸¹ The majority of its residents, however, live in New York's oldest and largest housing project, which was begun in 1939.⁸² Red Hook has been challenged by high crime rates and suffered drug gang wars in the 1980s and 1990s, culminating in the accidental shooting of the highly regarded local elementary school principal Patrick Daly on December 17, 1992.⁸³ This shooting was one of the galvanizing events in the establishment of the Red Hook Community Justice Center.⁸⁴ The District Attorney's office, along with the Center for Court Innovation ("CCI"), an organization that had established a community court in Manhattan's busy Midtown area,⁸⁵ focused on Red Hook as the ideal spot to establish a community court.⁸⁶ The Executive Director of CCI explained why Red Hook offered unique advantages to host this experimental court:

CCI: I think what was of interest to us was testing [a community court] in a more residential or stable area or community. Certainly we were attracted to Red Hook because of its physical isolation . . . but also it seemed like a very interesting place to be able to test because it is small and it is sort of like other American places, oddly enough even because it is so different. In so many ways what we were aware of is that people come to Red Hook from around the country actually can find that they can

80. See *id.* at 182-83.

81. Donovan, *supra* note 9, § 11, at 7; see Tara Bahrapour, *Warehouse is an Emblem of Newest Waterfront Battles*, N.Y. TIMES, Feb. 9, 2003, § 14, at 8.

82. Kasinitz & Rosenberg, *supra* note 9, at 183.

83. See David Gonzalez, *A Man Who Won Trust and Offered a Way Out*, N.Y. TIMES, Dec. 18, 1992, at B12; see also Seth Stern, *A Court of Second Chances*, CHRISTIAN SCI. MONITOR, Aug. 22, 2002, at 11.

84. See Stern, *supra* note 83, at 11; see also Donovan, *supra* note 9, § 11, at 7 ("The movement to create the center began after Patrick Daly, a beloved principal at P.S. 15 on Sullivan Street, was killed in a drug-related gunfight in December 1992 as he searched the Houses for a nine-year-old boy who had left school crying after a fight.").

85. The Center for Court Innovation is a not-for-profit organization that works in partnership with the New York State Unified Court System to establish new public and private initiatives. For more information, see the Center for Court Innovation website, at <http://www.courtinnovation.org/center.html> (last visited Mar. 15, 2003).

86. CCI had established one community court in Midtown Manhattan prior to planning the RHCJC. The opportunity to work in Red Hook was in part motivated by the fact that the Midtown Community Court ("MCC") was functioning in a neighborhood with no clear residential population and whose interests were arguably more defined by business interests.

often relate to Red Hook more easily that they can relate to midtown Manhattan in terms of an isolated community. So I think that what we really wanted to do was to see the extent to which the court can act as convener and test the extent to which the court could welcome through its front door and its back door, so that people can come into the court using its services . . . and see the extent to which the court could either sponsor, or encourage, or be a place where it could provide diverse activities within the community that would promote things as diverse as youth leadership and things like Youth Court and Education to things like GED sponsorship. . . .⁸⁷

Red Hook is exactly the type of neighborhood that a community court model hopes to benefit. The RHCJC was located in the middle of a residential community that had a series of public safety issues, which also resonated with the Court's aspirations to legitimize law, legal institutions, and the legal process. The neighborhood is challenged by the concentration of social deficits, including crime.⁸⁸ When Red Hook enters the public consciousness in New York, it is rarely in a positive context. In 1988, *Life* magazine labeled Red Hook one of the most crack-infested communities in the nation.⁸⁹ Yet, there are distinct community building blocks. Red Hook possesses a network of community groups, including tenant associations, a local Beacon school,⁹⁰ youth organizations, local development corporations, and churches.⁹¹ Red Hook also has several natural assets, including open spaces for recreational use, and

87. Dr. Malkin conducted these interviews in Red Hook and its surrounding neighborhoods in Brooklyn between October 2000 and December 2001. Federal regulations for human subjects research require that interview participants are guaranteed privacy, confidentiality, and anonymity. See 45 C.F.R. § 46 (1991); see also Donna Shalala, *Protecting Research Subjects—What Must Be Done?*, 343 NEW ENG. J. MED. 808 (2000). Copies of the interviews, redacted to exclude individual identifiers, are on file with the Authors.

88. Cf. Amy Waldman, *Neighborhood Report: Red Hook; At Housing Project, Drugs Linger but the Killing Fields Go*, N.Y. TIMES, Feb. 1, 1998, § 14, at 8.

89. Edward Barnes & George Howe Colt, *Crack: Downfall of a Neighborhood*, LIFE, July 1988, at 92.

90. The Red Hook Beacon Community Center is an after-school program run by Good Shepard Services of Brooklyn at PS 15, an elementary school at 71 Sullivan Street, in Red Hook. For the location and further information on the Red Hook Beacon Community Center, see the Good Shephards Services website, at http://good-shepherds.org/sub-programs_services/ps-program_locations.html#rh13 (last visited Mar. 15, 2003).

91. Daniel McGillis, *Beacons of Hope: New York City's School-Based Community Centers*, NAT'L INST. JUST. J., Jan. 1996, at 2-15.

waterfront property with spectacular views of downtown Manhattan and the Statue of Liberty.⁹²

It is, however, also a neighborhood that has weak services and economic institutions. In common with many other low-income neighborhoods, it has experienced a decrease in the resources and services that help fight some of the social effects of poverty.⁹³ Furthermore, it has a sense of abandonment: abandonment of the economic sectors that sustained the neighborhood, such as the waterfront industry and the related manufacturing businesses;⁹⁴ abandonment by the government who not only reduced the levels of resources and services the community, but also by local charitable groups that suffer cutbacks and come and go;⁹⁵ and, most important for this discussion, abandonment by the law enforcement community whom the community holds partly responsible for the rampant growth in the drug gangs and related violence due to its (perceived or real) inability to provide effective enforcement and to deploy enough patrols to protect the neighborhood from the drugs and violence that hamper everyday life.⁹⁶

The community court in Red Hook was opened in April 2000, after a long planning period that began in the early 1990s.⁹⁷ By the time the court opened, the neighborhood was already in transition. In the research interviews, different groups, including newer homeowners, older residents and the large numbers of residents in public housing had contested views of the neighborhood. Each of these groups had particularized visions of the neighborhood's better future, but each imagined the improvement happening in different ways. Newer arrivals, gentrifiers, and older residents who live in the private houses at one end of Red Hook are mobilized mainly through their aspirations to transform the neighborhood into one more "Brooklyn residential brownstone" neighborhood.⁹⁸ In contrast, the residents of public housing (which comprise the neighborhood's majority) are more concerned with maintaining the public

92. Kasinitz & Rosenberg, *supra* note 9, at 182.

93. See The Red Hook Civil Association website, at <http://www.redhook-brooklyn.org> (last visited Mar. 15, 2003).

94. Kasinitz & Rosenberg, *supra* note 9, at 182.

95. *Id.*

96. See Waldman, *supra* note 88, at 8; see also Donovan, *supra* note 9, § 11, at 7.

97. See N.Y. Ass'n of Pretrial Serv. Agencies, *supra* note 56; see also GREG BERMAN, CTR. FOR COURT INNOVATION, RED HOOK DIARY: PLANNING A COMMUNITY COURT 1-8 (3d prtng. 2001), available at http://www.courtinnovation.org/pdf/redhook_diary.pdf (visited Mar. 15, 2003).

98. Donovan, *supra* note 9, § 11, at 7.

housing projects, and the creation of new opportunities, such as jobs and after-school programs.⁹⁹

In spite of these differences, all residents share the desire for a safe environment. Furthermore, many residents have memories of previous decades when threats to personal safety were much higher and crime was a major problem. Public housing residents still experience these problems—albeit at a lesser level—and a subsequent deterioration of their quality of life. Throughout Red Hook, however, residents coincide in their desire for the neighborhood to be a space where families, businesses, and residents can all thrive and enjoy a quality of life they observe daily in neighboring areas, some of which contain very expensive property.¹⁰⁰

B. The Red Hook Community Justice Center As an Operating Model for a Community Court

After an extended period of consultation with different community leaders within Red Hook, and representatives for the neighborhood whose work involved other domains of public life in New York City (for example, Community Board leaders), CCI designed an operating model that had the court working as a multi-jurisdictional court, combining criminal, family, and housing in one courtroom presided over by one judge.¹⁰¹ CCI and community representatives toured eight possible locations. They selected an abandoned school that lies between the public housing sites and the older waterfront area, and with the support of public and private funds, CCI converted this school into the Red Hook Community Justice Center.¹⁰²

They planned for the RHCJC to provide social services for defendants and residents either through its own staff, or by enlisting partner agencies to work in the building.¹⁰³ Community service would provide work groups that could address neighborhood concerns. Other preventative programs were also solicited, including a GED class, a youth court, an AmeriCorps program for local residents, a mentoring program, a victim advocate program, various group therapies and counseling, a mediation program, and job-training and job development programs.¹⁰⁴

99. See *supra* note 87 and accompanying text.

100. Donovan, *supra* note 9, § 11, at 7.

101. See, e.g., LEE, *supra* note 3, at 18.

102. BERMAN, *supra* note 97, at 7-8.

103. See, e.g., LEE, *supra* note 3, at 18.

104. *Id.* at 18-19; see also Donovan, *supra* note 9, § 11, at 7.

CCI established an AmeriCorps program in the neighborhood in November 1995, more than three years before the court opened.¹⁰⁵ Today, AmeriCorps members complete a mandatory number of weekly work hours in different institutions (from the police precinct, to the housing office, to the schools). AmeriCorps members participate in community events, such as arts and cultural programs and neighborhood days. Among their activities, AmeriCorps members also organize a baseball “little league” every summer and an annual block party outside of the Justice Center, run a Christmas coat drive for charity, and participate in “park clean up days” organized by the Court. AmeriCorps members escort defendants to drug treatment, they supervise children in day care at the Court, and help defendants meet community service mandates.

CCI conceived of operating model that had the Court working as a multi-jurisdictional court combining criminal, family, and housing in one courtroom presided over by one judge. The courtroom is open five days a week, from Monday to Friday. The criminal court hears misdemeanor cases and low felony cases (D and E) everyday. All summons (the majority of these are quality-of-life violations, such as open alcohol containers or public urination) are heard on Tuesdays. Family court, which hears juvenile delinquency and family offense matters, is held on Tuesday afternoons. The Justice Center has a district attorney’s office and Legal Aid (indigent defense service) office on site. The New York City Criminal Justice Agency, the city’s pretrial services agency for bail screening, also has offices in the Justice Center, as does the New York City Probation Department.

At the end of the research period, a housing part (“HP”) was poised to open to hear cases one day a week. This was only to serve New York City Housing Authority (“NYCHA”) residents, and was to deal with hold-over (eviction) cases brought against residents by the NYCHA, as well as non-payment actions against tenants for delinquent rent. These cases often are the result of disputes between tenants and the NYCHA over tenant claims that their apartments are in disrepair. Tenants can initiate claims in housing court, seeking a court order directing the NYCHA to make needed repairs to an apartment. In our interviews, NYCHA tenants complained of long-standing problems involving no heat, hot water holes in walls, and broken windows. Addressing these claims is part of the HP jurisprudence of settling these cases.¹⁰⁶

105. See N.Y. Ass’n of Pretrial Serv. Agencies, *supra* note 56.

106. See *supra* note 87 and accompanying text.

The Court has responded to tenant's concerns by efficiently reducing the backlog of housing repair "tickets." The RHCJC Judge has been a driving force in resolving the longstanding tensions between NYCHA and public housing residents. In a recent case, the Judge personally visited a building to verify that there was no hot water.¹⁰⁷

The criminal courtroom hears cases from three police precincts, the Seventy-Sixth, which encompasses Red Hook, the Seventy-Second, and the Seventy-Eighth. These three precincts actually take in a variety of surrounding neighborhoods, from the exclusive Park Slope brownstones, to the staid garden apartments of Carroll Gardens, to the adjacent Cobble Hill neighborhood of newly renovated brownstones and upscale shops, to the heavily immigrant area of Sunset Park.¹⁰⁸ While the Court's physical presence immediately affects Red Hook, and is far more accessible for these residents, the services and courtroom are open for anyone arrested in these precincts, while the voluntary uptake of the services is available for anyone.

The courtroom is on the main floor when you enter the building. The first floor also has a mock courtroom, a childcare center, Legal Aid offices, and other social services; other programs and services are located throughout the building. Some of these are run by CCI staff, and others are operated by partner agencies enlisted by CCI, and ready to devote their resources (in most cases the cost of placing a member of staff in the Justice Center). The Court also provides sanctions in the forms of community service crews, which would be able to address neighborhood concerns.

Thus, the RHCJC houses a diverse collection of agencies under one roof. Appendix A shows the social and legal services in RHCJC as of December 2002. In the clinic upstairs, there are three to four CCI social workers and counselors, one youth worker from Good Shepherd Services, staff from Phoenix House (a total abstinence treatment program), and probation officers. Counselors from the Counseling Service of the Eastern District of New York¹⁰⁹ come in twice a week to give marijuana counseling groups. A staff member from Park Slope Safe Homes had also recently

107. *Modon v. N.Y. City Hous. Auth.*, No. 20010 (N.Y. Hous. Ct. Mar. 19, 2003).

108. See Donovan, *supra* note 9, § 11, at 7.

109. The Counseling Service of the Eastern District of New York ("CSEDNY") is a social service agency in Brooklyn that provides counseling to persons referred from numerous private and public agencies in the New York metropolitan area. CSEDNY specializes in substance abuse treatment for persons referred from the criminal justice system, youth services programs, and private employers.

begun to make weekly visits to the Justice Center to offer counseling for domestic violence issues. This collection of agencies allows defendants and residents to attend different therapeutic groups on-site, or to be referred to agencies around the city.

In addition to these more therapeutic services, the Justice Center has established other types of programs. A victim services is on site to work with victims of assault and other crimes. There is a GED program held every morning during the school year and twice a week in the evenings on the top floor. There is a mediation program staffed by CCI and others trained in mediation who provide sessions twice a week to try to resolve criminal cases as well as other disputes. There is also a Housing Resource Center. Before the housing part opened, its main use was to refer disputes to the mediation center and provide people with information about government housing programs. After the court opened its Housing Resource Center, it also instructed individuals who were being summoned for hearings at the NYCHA administrative offices for eviction and nonpayment about where to go and what to do. The Housing Resource Center staff works with NYCHA to ensure that repairs are completed for heat, hot water, plumbing, and electricity. There also is representative of the Human Resources Administration (the city's public assistance agency) onsite to help tenants to meet rent payments.¹¹⁰

Also on the main floor of the building is the Youth Court, where teens conduct non-binding simulated court hearings two evenings a week in a mock courtroom using a "teen court" or peer adjudication process.¹¹¹ Tucked away at the back of the basement is a part-time staff member of the Fifth Avenue Committee who directs job-seekers to programs, helps them with their resumes, and, when possible, sends people for job interviews.

CCI also began a mentoring and internship program in 2001 to place youth court members in community service and other activities. The AmeriCorps program, detailed above, is managed from the building and runs the Red Hook Public Safety Corps. This program was begun by CCI (in partnership with the district attorney and the city's victim services agency) in 1995, nearly five years before the Justice Center opened. This program recruits individu-

110. See *supra* note 87 and accompanying text.

111. See, e.g., Jeffrey A. Butts & Janeen Buck, Office of Juvenile Justice & Delinquency Prevention, *Teen Courts: A Focus on Research*, OJJDP JUV. JUST. BULL., available at http://www.ncjrs.org/html/ojjdp/jjbul2000_10_2/contents.html (last visited Mar. 15, 2003).

als from Red Hook and Brooklyn each year and features a large number of individuals who have grown up in the neighborhood or surrounding areas.

Eighteen months after hearing its first case, the RHCJC also began a program, Operation Toolkit,¹¹² where they solicited community members to identify local problems of crime and disorder. The RHCJC, along with other concerned groups and individuals, could then consider the ways their varied groups and contacts (district attorney's office, police, defense lawyers, social workers, and court staff) could help to solve these problems. They also created a Community Advisory Board, which included different members of the criminal justice system, court staff, community leaders, community board members, community group leaders, school principals, police precinct captains, and a few other notable local residents. The board meets once every three to four months. At these meetings, the court gives the audience an update on their progress, hears complaints from residents about neighborhood conditions or services, and solicits ideas about community services and projects that might be undertaken by the Justice Center to improve the neighborhood (under Operation Toolkit). While the RHCJC began with a criminal court in April 2000, the family court cases arrived about one year later in May 2001; two years after the criminal part first opened, the Housing Part opened.¹¹³ The Justice Center could finally claim to be a multi-jurisdictional court (although it has encountered less overlap between cases in the different courts than its initial conception envisioned).

At the end of the research period, the Justice Center could be seen as running closer to the way it had envisioned in its initial proposals. As an organizational challenge, CCI managed to negotiate much of the bureaucratic inertia that grows over time in some organizations. In addition to persuading criminal justice agencies such as Probation and Legal Aid to provide staff on-site, they convinced the New York City Department of Correction to provide a

112. Operation Toolkit aims to deal with community problems by combining both RHCJC resources and those of outside partners (the police, the district attorney, the community, and the church) to see if there are new and innovative ways to solve community problems. See GREG BERMAN, CTR. FOR COURT INNOVATION, REPORT TO THE NEW YORK FOUNDATION: OPERATION TOOLKIT 5, 6 (2002).

113. See Community Board Six General Board Meeting, Minutes (Sept. 11, 2002) (representing the Red Hook Community Justice Center, Kelli Moore, reported that since beginning in May 2002, the Housing Court component of the Justice Center had already heard more than 300 cases), available at http://www.brooklyn6.org/Committees/Committee_3/CBM200209.doc (last visited Mar. 15, 2003).

bus to pick up defendants twice a day. The RHCHC recruited partner agencies and they tirelessly engaged in fund raising so as to establish and sustain programs (for example, the mentoring program that was introduced in 2001). They monitor and track defendants effectively and have better-than-average rates for short-term sanctions.¹¹⁴ Warrants are issued for defendants who do not show up for their sanctions, and they frequently are returned to the court by police.

For the most part, individuals who have visited the court are impressed by the clean new building, and the courteous way in which they are treated. Many of these defendants and visitors have had experiences with courts downtown and are aware that the RHCJC is a more pleasant and less antagonistic environment in comparison. They are greeted by court officers who are polite and friendly, some of whom even participate in the little league in Red Hook, and others who help the neighborhood children with their homework when they are on evening duty. From our interviews, even the defendants who remained skeptical of the programs and are less than enthusiastic about their mandates to therapeutic groups or community service usually preferred to have been processed through the Red Hook Court over the sprawling criminal court in downtown Brooklyn.¹¹⁵ Many are brought in more than once. The intimate scale and organization of the Court means that many are familiar with the staff. In fact, a major goal of the RHCJC is that this familiarity will ultimately lead the defendants back to the Court voluntarily when they are looking for help.¹¹⁶ Although this is a rare occurrence, voluntary usage of the Justice Center's therapeutic services such as drug treatment does happen occasionally.

C. Practical and Conceptual Challenges

At this operational level, the RHCJC could be seen to be relatively successful. The courtroom works efficiently; the staff is, for the most part, extremely pleasant (especially in relation to downtown courts). The RHCJC has created partnerships with different social service agencies that are in the buildings; it launched programs to address local disorder problems such as cleaning up a park. RHCJC provides case processing that mandates defendants

114. A quantitative assessment on the case processing and sanctions cannot be provided in this Article due to space limitations, but such assessments will be provided in future publications.

115. See *supra* note 87 and accompanying text.

116. See LEE, *supra* note 3, at 18.

into different social services; and since 1995, it has had an AmeriCorps program.¹¹⁷ The judge and other CCI staff attend community meetings, participate in local social events and recreational activities, and listen to community complaints about crime, housing, and disorder problems. While this model sounds ideal in terms of fulfilling the new role envisioned for a community court, as well as a pathway to legitimize its role in the community, some major fault lines have or are beginning to emerge that could impede this goal are outlined below.

1. *Social Needs Versus Legal Needs*

A community court is driven by an agenda that responds to local needs. At the same time, residents' social norms have to coincide with the needs of the law. Sometimes these are not easily reconciled: the Court remains a court and is limited by the fact that it operates within a legal field. For example, even if residents asked for marijuana to be legalized, the Court could not change its legal mandates. The Red Hook Court tries to balance its pursuit of public safety with its concerns for fair treatment and therapeutic sentences.¹¹⁸ Both dimensions of the Court contribute to its perceived legitimacy.¹¹⁹ When the needs of the community and the legal institution coincide, this will work; however, if they clash, this threatens to destabilize the model.

In Red Hook, community leaders were consulted in the RHCJC planning stages.¹²⁰ The Justice Center was the culmination of six years of community needs assessments and planning that included focus groups, surveys, and town hall meetings.¹²¹ Leaders made it clear that their main concern was to provide the neighborhood with prevention programs and new social services, in addition to a court that would provide individualized justice laden with therapeutic content. Craig Hammerman, the district manager of Community Board 6 in 2001, when the interviews were conducted, was involved in this process. Community Board 6 is the district that includes Red Hook along with other very different neighborhoods.

117. See, e.g., *id.*; see also Donovan, *supra* note 9, § 11, at 7.

118. See LEE, *supra* note 3, at 18.

119. See TYLER & HUO, *supra* note 13, at 101-08. See generally JOHN RAWLS, *A THEORY OF JUSTICE* (2d ed. 1999).

120. See LEE, *supra* note 3, at 18; see also BERMAN, *supra* note 97, at 3-4.

121. JOAN JACOBY & E. RATLEDGE, *FOCUS GROUP REPORT: COMMUNITY EXPECTATIONS OF THE RED HOOK COMMUNITY JUSTICE CENTER* 8 (1994) (on file with authors).

CB6 Leader: We tried to bring everyone together, just to start talking about the kinds of things the neighborhood felt they needed. And certain themes started to emerge. Employment training and assistance was generally at the top of everyone's list. And, lock-step with that was educational assistance—tutoring, mentoring programs, counseling programs, drug prevention, family planning. All of these kinds of themes just emerged from so many different sources that it was clear to all that these were really what the essential needs of the community were, that they felt were not being met. And so, the whole non-offending population of Red Hook services started to take shape and form over the course of these discussions Initially, it was a difficult project because it was presented as a concept, and a lot of concepts come to us, but very few of them actually reach fruition. They did not have a fully thought-out plan, they certainly did not have a site for this. We wanted to try to lend some practical assistance where we could, in bringing people together, to talk about the problems—one of them being what this non-offending population would be, another one being, what kinds of services this facility would offer.¹²²

Planners included social services in the RHCJC that were available for anyone on a walk-in basis. During the planning process, community leaders stressed education, job training, and youth development as major categories of services they required. Community leaders also were sold by planners on the idea of community service crews as part of a restorative justice model that would work throughout the neighborhood.¹²³

The RHCJC opened with a selection of these programs and services on site. The Court caseloads were dominated, however, by drug arrests made from trespass sweeps taking place in Red Hook public housing and elsewhere (for example, Operation Condor).¹²⁴

122. See *supra* note 87 and accompanying text.

123. See BRAITHWAITE, *supra* note 22, at 67 (discussing a study that showed that completing community service resulted in a greater commitment to the community and feelings of citizenship).

124. Operation Condor was an initiative of the New York City Police Department that used overtime pay to motivate police officers to make “buy-and-bust” arrests for drug offenses. The program produced thousands of arrests across New York City, but its tactics raised complaints from minority citizens about its racial disproportionality, and the excessive use of a full criminal justice process (including the use of pretrial detention rather than summons) for low-level drug offenders whose crimes were mostly non-violent and who posed a minimal public safety threat. The death of Patrick Dorismond, an unarmed citizen who was approached by police officers who tried to sell him marijuana during an Operation Condor arrest, heightened racial tensions between minority citizens and the police. See Jeffrey Rosen, *Excessive Force: Why Patrick Dorismond Didn't Have to Die*, NEW REPUBLIC, Apr. 10, 2000, at 26; see also

Large numbers of individuals were brought in on drug charges ranging from misdemeanor marijuana possession, to possession of controlled substances (powder cocaine, crack, or heroin). During the planning stages of RHCJC, residents identified drugs and serious violence as chronic problems they hoped the Court would address.¹²⁵ But the Court had not anticipated such high numbers of drug arrests over its first eighteen months. Nor did the Court plan for its criminal courtroom to be so dominated by drug charges. As a solution and by necessity, the Court adopted a drug treatment court model. Treatment schedules were devised and weekly updates to monitor defendants' (now clients) progress were institutionalized. The Court professionalized its drug treatment program and its contacts with treatment providers throughout the city as it referred defendants into short- and long-term treatment.

In the meantime, one of the two job-training courses run by outside agencies left the Justice Center due to both funding problems and low participation rates. A second provider, a job development program of the Fifth Avenue Committee, remained active. Also, the nurse supplied by community health network left after a long wait for the Court to obtain the certification of the health suite as a clinic licensed for testing and other medical services. Only the GED program, AmeriCorps, child care, victim advocacy, the Housing Resource Center, and Youth Court programs remained. While community service crews occasionally went to fix things around the neighborhood, they were focused mainly inside the courthouse, cleaning the facilities. The courtroom was more concerned with placing defendants into therapeutic groups than on concentrating on the way community service crews and other programs could be used as a form of restorative justice. It was not until 2002 that the Justice Center restructured these programs to launch clean-up projects in locations within the Red Hook neighborhood. Many of these were efforts designed under Operation Toolkit.¹²⁶

This move to therapeutic jurisprudence focused on drug cases took place as lawyers, judges, and most specifically, the district attorney's office advocated drug treatment for defendants, even for

William Rashbaum, *Police Suspend Extra Patrols for 10 Days*, N.Y. TIMES, Oct. 10, 2000, at B1.

125. BERMAN, *supra* note 97, at 2-3.

126. See *supra* notes 87 & 112 and accompanying text; see also BERMAN, *supra* note 112, at 5-6.

those who did not come in on drug arrests.¹²⁷ The high prevalence of drug cases on the criminal court's docket seemed to attenuate the creativity and innovation in sanctions that were central to the Court's original vision.¹²⁸ Instead, the Court shifted toward a social service agency that efficiently allocated defendants to therapeutic programs writ large. Community residents' expectations that a wide range of services would be available on site became increasingly less of a reality as the Court drifted towards a structural and jurisprudential model already established in other treatment courts.¹²⁹ One of the important goals of the concentration of services within the Court—the ability to obtain services on-site—remained only partially realized. Although housing services flourished with the opening of the Housing Part, several other core services such as job counseling moved out or lost funding. Defendants still travel to get many of services they need, especially drug treatment. As a referral service, however, the treatment clinic functions well, catering to individual addicts and their needs.

This organization of the RHCJC is a logical conclusion to managing caseloads produced by police enforcement priorities, and it meets the requirement of law and the district attorney's policy preferences for court-centered treatment of drug cases. This, however, was not necessarily the idea that community leaders had in mind in the planning stages for the Court. During Community Advisory Board meetings, community leaders are presented information about the number of people given sanctions, the number of people sent to treatment, and the number of people who do community service, but the leaders are not aware that the Court provides a narrower range of services on site than they imagined or expected. The RHCJC evolution and responsiveness has been driven more by the explicit need of prosecution of drug arrests, in the context of the Red Hook community's interest in drug treatment as one of a large number of sanctions and interventions.

The inability of the RHCJC to position itself outside of the more traditional courts as it responds to the needs and pressures within

127. See, e.g., Morris B. Hoffman, *Therapeutic Jurisprudence, Neo-Rehabilitationism, and Judicial Collectivism: The Least Dangerous Branch Becomes Most Dangerous*, 29 *FORDHAM URB. L.J.* 2063, 2068 n.22 (2002).

128. Although we observed other types of sanctions, such as alcohol evaluations in drunk driving cases, or treatment interventions in domestic violence cases, the heavy load of drug cases on the criminal court's dockets dominated thinking and planning about sanctions, and the location of providers to deliver them. See *supra* note 87 and accompanying text.

129. See NOLAN, *supra* note 24, at 189-93.

the legal system—such as prosecutor’s need for a flow of cases into drug treatment—is reflected by the limited uptake by Red Hook residents of the localized services and other RHCJC outreach efforts. Participation varies across the several programs in RHCJC, from strong participation in AmeriCorps to low participation in Youth Court.¹³⁰ Implicit in the RHCJC’s vision were a large number of voluntary users of the Court’s services. Some residents have walked in asking for help such as mediation services or sports programs and they have benefited from those services.¹³¹ Most residents, while acknowledging the presence of the RHCJC in the annual AmeriCorps survey, still have not branded the RHCJC as anything more than a court, and their lives remain untouched by its presence.¹³²

2. *Procedural Justice*

The Court exists in a community where many of the individuals have had experiences with several courts—family, criminal, and housing. In several cases, residents described these experiences as more negative than positive, and individuals may have been left more skeptical of the courts and their exercise of power. More than a few regarded the courts as contributing to crime problems, not ameliorating them, due to inefficient case processing, unfair judgments, and lack of protection against the state’s power to punish.¹³³ So, an alternative vision to the RHCJC model exists in Red Hook, one that exists in tension with the demands from the community to address crime and drug problems. This alternative vision is a more traditional vision of criminal justice, within an adversarial model: more efficient case processing coupled with fair judgments.¹³⁴

For some, the trade-off of due process rights for treatment, implicit in the therapeutic court model, is seen as a threat to delegitimize the new Court.¹³⁵ This is a tension in many drug courts,

130. *See supra* note 87 and accompanying text.

131. *See supra* note 87 and accompanying text.

132. *See supra* note 87 and accompanying text.

133. *See supra* note 87 and accompanying text; *see also infra* note 149 and accompanying text.

134. *See* N.Y. Ass’n of Pretrial Serv. Agencies, *supra* note 56.

135. Morris B. Hoffman, *The Drug Court Scandal*, 78 N.C. L. REV. 1437, 1479 n.166 (2000); Mae C. Quinn, *Whose Side am I On, Anyway? Musings of a Public Defender About Drug Treatment Court Practice*, 26 N.Y.U. REV. L. & SOC. CHANGE 37, 42-43 (2000); *see* NOLAN, *supra* note 24, at 71-72. *But see* Peggy Fulton Hora et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System’s Response to Drug Abuse and Crime in America*, 74 NOTRE

where defendants receive treatment in lieu of jail time. But some defendants may agree to treatment, which they define as a sanction, even while protesting their innocence.¹³⁶ Professor Malcolm Feeley, for example, links the expansion of “alternatives” to the traditional court process in the name of efficiency as an entrepreneurial expansion of social control, rather than a substitute for ineffective methods.¹³⁷ The benefit to the common good to which community courts aspire may be compromised by the loss of other traditional roles that the Court and its players are meant to fulfill.

This tension emerges in Red Hook when one compares drug cases with other cases. The Court has directed most of its energy towards providing effective treatment of drug addicts. These cases take up a large amount of the Court’s attention. Defendants treated for this may accrue positive experiences if they feel the Court has given them an opportunity. Nevertheless, the real numbers of individuals in long-term treatment and under case management are much smaller than the number of individuals brought in on quality-of-life crimes and other minor issues. Many defendants in these quality-of-life cases regard these charges as arbitrary and unfair.¹³⁸ The Court does little to “hear” these defendants. Thus, they are not allowing them the “expressive voice” found to play an important role in allowing individuals to have a positive court experience.¹³⁹ It is the expressive voice that helps them feel acknowledged in terms of procedural justice.¹⁴⁰ Indeed, while the drug-addicted are encouraged to have an “expressive voice” to the judge, and in many ways “express” their guilt in public in front of a

DAME L. REV. 439, 459-62 (1999) (describing how drug arrests have outpaced other criminal arrests since 1980). See generally Colloquy, *The Drugging of the Courts: How Sick is the Patient and What is the Treatment?*, 73 JUDICATURE 314 *passim* (1990). See also *infra* note 202.

136. Wendy N. Davis, *Special Problems for Specialty Courts: Clients Get Needed Treatment Rather Than Jail Time, but Prosecutors and Defense Lawyers Alike Worry about Compromising their Roles as Advocates*, 89 A.B.A. J., Feb. 2003, at 36 (2003); Quinn, *supra* note 135, at 59.

137. Malcolm M. Feeley, *Entrepreneurs of Punishment: The Legacy of Privatization*, 43 PUNISHMENT & SOC’Y 321, 334 (2002).

138. See *supra* note 87 and accompanying text.

139. See TYLER, *supra* note 34, at 116-17. Professor Tom Tyler found that even individuals who felt that their legal experience had not had the outcome they desired could feel that they were given a fair hearing. *Id.* For many, the idea of fairness included this idea of being listened to, or having the chance to express ones circumstances—this is what Tyler calls the expressive voice. *Id.*

140. *Id.*

judge who now cures them,¹⁴¹ other defendants are sent to community service which, most commonly, results in cleaning the courthouse. Indeed, many defendants when asked what they thought community court meant, thought this was a Court where you had to do community service.¹⁴²

3. *Crime Control*

The RHCJC has defined its role in large part as addressing crime and quality-of-life crimes in Red Hook.¹⁴³ This is only one of several roles that the community has asked the Justice Center to take on. Indeed, the community may see the Justice Center's role to be about fair procedural and distributive justice, or about service delivery, or about repair of disorder conditions, or mediation with the Housing Authority.¹⁴⁴ Though concerned about crime, Red Hook residents were not expecting the Court to solve crime.¹⁴⁵ Why, then, pursue crime reduction as an institutional goal, when so many of the forces that contribute to crime are beyond the control or influence of the Court and the service reach of the Justice Center? By creating a more responsive Court built on individualized justice and provision of social services, the Court hoped that Red Hook citizens would attribute to the RHCHC a high level of legitimacy. The Court hoped that this legitimacy would motivate citizens to actively participate in social regulation and informal social control, thereby reducing crime rates. Accordingly, the expectation of lower crime rates was an explicit goal of the Court's planners.

Crime reduction may not be the *sine qua non* of the RHCJC, but it is an inescapable expectation that attaches both to the arguments in favor of its creation, and to the external views of the Court by the community and court system that accommodate and host it. Crime reduction is the justifying narrative for the therapeutic jurisprudence of the Court—the elimination of returning cases through treatment intervention. By leveraging its legitimacy into greater motivation by neighborhood residents to engage in social control efforts, the Court further embedded the expectation of lower crime rates into its justifying narrative. But if the Court justified itself as simply a path to treatment, it could be accused of being “soft on

141. NOLAN, *supra* note 24, at 111-12.

142. *See supra* note 87 and accompanying text.

143. Yael Scachner, *Red Hook Center to be 'Model' Community Court*, N.Y. L.J., June 2, 2000, at 1.

144. *See supra* Part II.B.2; *see also* Berman, *supra* note 97, at 2-3.

145. *See supra* note 87 and accompanying text.

crime.” Furthermore, the theories of physical and social disorder, which animate the Court’s focus on quality-of-life crimes, are also part of a crime reduction narrative in popular understandings of law and order.¹⁴⁶

4. *Policing*

One of the major paradoxes of the community court model is that within this triad of community, court, and services, the police remain somewhat attached by a separate strand. The police, while an important presence in the community court, attending meetings and working both with the judge and district attorney, remain outside of the Court’s administrative control and political influence, and their practices remain unaffected by the Court. In a community like Red Hook, the police are *the* major player in terms of law enforcement. Residents in Red Hook report that most people have had direct experience with the police, good or bad, and the community still sees crime-solving to be the responsibility of the police.¹⁴⁷ Indeed, at public meetings, they still accuse the police of either a lack of enforcement or unfair enforcement that leads to arrests of people for what they understand to be circumstantial or unfair reasons.¹⁴⁸

At Red Hook Tenants Association meetings, for example, which the police captain and police community liaison regularly attend, residents usually call for better and more policing. Although residents are not always clear about exactly what they want the police to do, or what tactics the police should use, residents consistently point to the low levels of patrol or law enforcement that leave drug dealers visibly doing business, even as police arrest what residents see as “the wrong people.”¹⁴⁹ In interviews, residents frequently complained of the way they or people they knew have been “disrespected” by the police.

146. DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 193-205 (2000); John Feinblatt et al., *Institutionalizing Innovation: The New York Drug Court Story*, 28 *FORDHAM URB. L.J.* 277, 281-82 (2000).

147. See *supra* note 87 and accompanying text.

148. See *supra* note 87 and accompanying text.

149. For example, Ketcham quotes a Red Hook attorney about policing in the neighborhood: “Let me tell you, for the record,” she says, “Community policing in places like Red Hook consists of little more than rousting the residents on a day-in, day-out basis. How come they’re not busting people with glasses of Chablis in the park after the Philharmonic? Open containers! Why stick with the 40s in the projects?” See Ketcham, *supra* note 14.

Even those people who are trying to exercise informal mechanisms of social control—for example through tenants' patrol or through running youth groups—feel they can do nothing without the cooperation of the police. For example, at Tenant Patrol meetings and Red Hook Tenant Association meetings, tenant patrol leaders frequently complained about police absence when they were sitting on patrol.¹⁵⁰ The absence of police finally caused one tenant leader to resign when she was threatened by local youths who sold drugs; she felt that her attempt to work for the community was not partnered by the police.¹⁵¹

Tenant Patrol Leader: You see the problem is that we are so distrustful of the police around here . . . there is [sic] always eyes and ears you know, that just going to find out what the tenants are saying, so they could go back and tell the people who shouldn't be hearing all that. So we are in a situation where we don't trust the police and we don't trust our neighbors.

Interviewer: What would make you trust them?

Tenant Patrol Leader: If they would do some of the things that they are supposed to do. You call . . . you call. OK say the Quality-of-Life thing that they have, the Quality of Life that they have is that we are guaranteed to have a secure place where we live at, we are not supposed to be scared to go outside, or even to the mail box, because there are people in the hallway. When we go to the police and tell them, first thing they ask "do they live in the building?" If they lived in the building, we wouldn't be calling them. You see they tell us don't call 911 for certain things; when we call the Quality of Life number we still don't get any response. We are so tired of the police not caring about what is going on. Then the Justice Center was supposed to be designed specifically for this area to deal with what is going on. Every arrest they make in Red Hook was supposed to have these people doing community service in the community. They are not doing it. I haven't seen anybody convicted of a crime doing community service in the community. You know and it is like the Justice Center, we never really hear anything about that.¹⁵²

The RHCJC has actively sought the support of the police, but it has yet to address the issues of police-citizen interactions, or the responses of police-to-citizen reports of crime. At the same time,

150. *See supra* note 87 and accompanying text.

151. *See supra* note 87 and accompanying text.

152. *See supra* note 87 and accompanying text.

the police tend to blame the Court's "revolving door"¹⁵³ for the intractability of quality-of-life problems and other crimes in response to residents' complaints about the police during community meetings. It was not uncommon to hear police say that they can make an arrest, but they had little control once the person is in court.¹⁵⁴ The RHCJC, in its need for legitimacy within the community, sits in the crossfire between citizens and the police. The RHCJC needs the police to support the Justice Center's daily operations, and the police similarly need the Justice Center's help in identifying and punishing serious offenders.¹⁵⁵ The police will refer residents and complaints to the Court if it trusts the Court to manage these problems. Informal interviews with the police, and observations of court-police interactions show that while the RHCJC has been successful in gaining the support of the police, it has been less successful in responding to residents' concerns and acting as a mediator between the police and the community. Although smoothing police-citizen relationships was not an explicit goal of RHCJC, one informal role of the AmeriCorps volunteers has been to hear citizen complaints about police. This is quite different from creating a formal or direct channel for residents to directly convey their concerns about the police, or raising these issues directly in their interactions with police. Citizens' evaluations of the legitimacy of the law and legal institutions are greatly influenced by their subjective ratings of procedural fairness in their interactions with police, and many RHCJC residents rated the police poorly in both interaction quality and crime control.¹⁵⁶ Indeed, a common informal comment by RHCJC staff recorded after community meetings was to note that the police could not win; one moment the neighborhood residents were asking for more enforcement, and the next complaining that there were too many arrests.¹⁵⁷

This unofficial attitude of the court staff to the contradictions of the police is conveyed in formal ways to defendants and residents. For example, individuals who receive summons from the police often are mandated to attend "quality of life groups."¹⁵⁸ When

153. SVIRIDOFF ET AL., *supra* note 4, at 6.

154. *See supra* note 87 and accompanying text.

155. For example, the informal relationships between the court staff and police mean that the police can alert the prosecutors to known persistent offenders who are coming in front of the judge and ask for maximum sentences.

156. *See supra* note 87 and accompanying text.

157. *See supra* note 87 and accompanying text.

158. RHCJC created "quality-of-life groups" as an alternative to the traditional system of imposing fines for summons offenses that adheres in the centralized crimi-

participants express complaints about the validity of their treatment by police, court staff members most frequently respond, in the groups we observed, that they already had the moment to say this in front of the judge, but that they are now in these groups to discuss community problems and why police are giving these tickets.¹⁵⁹ Court staff focus the group content on how participants in the groups can ensure that they either avoid another summons or arrest. Participants' complaints are usually deflected even though many have not in fact seen the judge because when they arrive for their summons, they are advised that they can go straight to a "quality-of life group" and forego seeing the judge if they wish, and this will mean they can dispense with the ticket more quickly. Residents obviously appreciate the chance to dispense with their tickets quickly, especially when their court appearance often means losing pay, however, this format means they are denied any forum to express their discontent.

Group participants were also not given information about police precinct meetings where they could voice these complaints at any of the groups attended by the Authors.¹⁶⁰ Although this service was not part of the Justice Center's work, residents consistently identified policing as one of the community conditions that was problematic for them and that affected their quality of life.¹⁶¹ In one group, residents complained about summonses they had received for public urination in a park, and asked why there were no public toilets in their park.¹⁶² No one took this opportunity to advise them on how to petition their local politicians to obtain the types of improved services that could eliminate this low-level crime problem.¹⁶³ Instead, respondents were told that these quality of

nal courts. Each group session lasts about forty minutes. RHCJC staff explain the impacts of minor infractions—such as an open alcohol container or a dog off a leash—on the surrounding community. Participation is voluntary, and defendants can reject the group and ask for an appearance before a judge. Although they are unlikely to receive a criminal conviction for these types of offenses, defendants face a tradeoff of a quick and instant disposition with the possibility of a fine for a longer process that avoids monetary costs. For poor people in neighborhoods like Red Hook, the choice is obvious. In this dynamic, defendants rarely have a chance to object to the validity of the summons or to their treatment by the police.

159. *See supra* note 87 and accompanying text.

160. *See supra* note 87 and accompanying text.

161. *See supra* note 87 and accompanying text.

162. *See supra* note 87 and accompanying text.

163. Such problem-solving tactics are a routine part of the "new policing" that blends targeted enforcement with strategies to address social and other public services. *See, e.g.,* David Thacher, *Conflicting Values in Community Policing*, 35 *LAW & SOC'Y REV.* 765, 765-77 (2001).

life disturbances are bad for the neighborhood's reputation. In this case, the opportunity for residents to express questions of fair treatment by police and distributive justice in a legal or political forum is exchanged for efficient case processing that gets defendants through the Court and disposes of their summons ticket as quickly as possible. For residents, it seems that efficient case processing is exchanged for the opportunity to express questions of fair treatment by police and distributive justice in a legal or political forum.¹⁶⁴

The Court has included the police in discussions about community issues. As part of Operation Toolkit, the Court invited police captains and tenant association leaders to discuss problems in the local park, and find strategies for its improvement. While these problem-solving forums are productive, they have neither enabled "public" discussions that could make the average community member feel that the Court was bridging a gap between the police and the community, nor empowered the community in their relationship with the police. Furthermore, the tenants' association leaders and other community group leaders have had access to the precinct captains for some time before the arrival of the RHCJC as the police captain has tried to attend a variety of community group meetings around the neighborhood as part of his own community strategy. The RHCJC has yet to provide access to the police for those who have consistently lacked this access.

So far, the Court has been unable to create a political space where discussions can take place between the police and community residents. While some community members suggested at Community Advisory Board meetings that the police could hold workshops for young people in the Court, this was never taken up. Indeed, when one community member at the Community Advisory Board meeting began to complain about police activity, and point out that many young people were still afraid of the police, the judge got up afterwards to thank the police and remind people about the work they had done for Red Hook.¹⁶⁵

The Court is limited in its ability to influence police strategy and tactics; these decisions are made at the local precinct level and by police officials at the highest levels of the police department. Yet, the Court's work is shaped and strongly influenced by local police tactics. The Court also has no jurisdiction or influence on citizen-police interactions, but in the long term, these interactions contrib-

164. See Davis, *supra* note 136, at 36; Thompson, *supra* note 5, at 80.

165. See *supra* note 87 and accompanying text.

ute to individuals' overall experience of the law and willingness to participate in social control or cooperate with police.¹⁶⁶ If residents remain closed off from venues to express evaluations of policing, the positive experiences they have had with the Justice Center could be neutralized. It is not enough for the Court to claim they have no control over the police. There are numerous examples of new ways that the community and the police can work together outside of just encouraging residents to turn in drug dealers or spotting signs of disorder.¹⁶⁷ The RHCJC has created many points of contact with the police, such as police involvement in Youth Court training. But these structured activities are qualitatively different from establishing a democratic and transparent forum where citizens can dialogue with police on a range of topics, such as the Beat meetings in Chicago.¹⁶⁸ If the Court could create such a new forum for productive and cooperative interactions between police and community, it would then be making real inroads into changing common sense perceptions among all the stakeholders about law, power, and legitimacy.

5. "Just Another Government Program"

The RHCJC faces a history of poor government in the neighborhood. The relationship between the community and the government is one characterized mostly by disillusionment and disempowerment.¹⁶⁹ The RHCJC works within this legacy and has to battle to overcome it. This is no small task when this concept has been reinforced in a myriad of legal and quasi-legal interactions, from housing, welfare, and education to other everyday legal demands.¹⁷⁰

166. Mark H. Moore, *The Bottom Line of Policing: What Citizens Should Value (and Measure!) in Police Performance* (Police Executive Research Forum, Washington, D.C.) (2002). Of course, it is possible that a positive experience in the court might influence a citizen's perception and evaluation of the police, but contacts with the police tend to be far more common for most citizens than are contacts with the courts. See PATRICK LANGAN ET AL., U.S. DEP'T OF JUSTICE, CONTACTS BETWEEN POLICE AND THE PUBLIC: FINDINGS FROM THE 1999 NATIONAL SURVEY 1 (2001), available at <http://www.policeforum.org/BJS%20Contacts.pdf> (last visited Mar. 15, 2003).

167. See, e.g., WESLEY SKOGAN & SUSAN HARTNETT, COMMUNITY POLICING, CHICAGO STYLE 5-9 (1997); Jeffrey Fagan, *Policing Guns and Youth Violence*, FUTURE OF CHILDREN, Summer/Fall 2002, at 133, available at http://www.futureofchildren.org/usr_doc/tfoc_12-2j.pdf (last visited Mar. 15, 2003).

168. SKOGAN & HARTNETT, *supra* note 167, at 113-37.

169. See, e.g., Kasinitz & Rosenburg, *supra* note 9, at 183-84; *infra* note 149 and accompanying text.

170. EWICK & SILBEY, *supra* note 64, at 144-64.

The mere presence of the Court is not enough to generate its own legitimacy or reassure the community about “government.” In Red Hook, the community is accustomed to failure of government projects, and as displayed in our interviews, they seem to anticipate these failures.¹⁷¹ The few recent government initiatives (such as proposals to establish a waste transfer station and another to start a methadone clinic in the neighborhood) were viewed by neighborhood residents as threatening to its health and economy.¹⁷² The RHCJC is well aware of this challenge. In interviews, the senior court officials stressed that the RHCJC’s existence and its responsiveness will be a way to restore people’s faith in the courts, other government agencies, and ultimately, government itself.

Court Administrator: Our position is “Here is a problem, let’s talk agency to agency; how can we fix it?” . . . So in some ways it is providing this kind of agency for governmental support for the community to address issues, which if they were just operating as a community organization, they may have difficulty.

Interviewer: So it is a little leveraging. . .

Court Administrator: It’s leveraging the authority of the court. . . I would say that part of what we are trying to do [is] increasing public confidence in the justice system. . . You need to understand that that is what it is being driven by . . . You could make an argument that it is important to remember that this is really about trying to figure out ways to make the courts improve, and if it so happens that by putting it out in the community you are doing a slightly better job that is good. But it is not only about increasing public confidence in the justice system; it is actually increasing confidence in governmental systems in the way these systems operate. . . Six months down the road people won’t remember that there was a time when we didn’t do housing, but everyone will always remember if we do a really crappy job of dealing with our treatment cases. . . [That] creates a reputation for lack of integrity in what you are doing. I am not sure what we will find when we look at how many people are succeeding in the long term treatment, but I feel very comfortable that it is a very rigorous program that we have in place of tracking defendants on a weekly basis, reporting to the whole system, bringing people into the court periodically. I guess if

171. See *supra* note 87 and accompanying text.

172. *Id.* The community’s instinctual suspicion of government is activated not only for potentially harmful initiatives, such as the waste transfer station, but also for more benign proposals such as the plan to create a business improvement district for Red Hook. See BERMAN, *supra* note 97, at 3-4.

you are going to bite something off you have to show that you are doing it well, or show that you are making an improvement over the previous system.¹⁷³

Court directors hope this new faith emerges through the Court's case processing, which is highly individualized and responsive: people get the services they need, compliance is rigidly monitored, and the Court does not encourage a "revolving door" attitude to justice. The Court is also efficient and services are delivered quickly. Furthermore, the Court is accountable because it can respond to complaints from both individuals and community groups. Finally, as the Court canvasses the neighborhood for problems it can solve, and as it addresses these problems in new ways, it will also show the community that the government works for them.

While this may sound reasonable, the Justice Center may be optimistic in its assumption of just how far they have to go, even to prove to neighborhood residents that the Court has arrived for the good of the community alone. The annual AmeriCorps survey shows that over seventy percent of Red Hook residents know about RHCJC, and those who are aware of it generally approve of what it does.¹⁷⁴ They rarely see the Court as "harmful" to the community. But the most common assumption that defendants and residents articulated in the interviews when questioned about why the Court is in Red Hook, is that the downtown courts are overloaded, not that the Court's primary motivating factor is Red Hook's public good.¹⁷⁵ Furthermore, even those community leaders who have given the RHCJC its full support, such as this Pastor at a local church, are not without their own interpretations:

Pastor: I think it was for other people's benefit as well as for the people in Red Hook. But kind of more beneficial for, you know people got new jobs and big promotions, and you know, they did a whole building. Some people [in Red Hook] got jobs but far from what others should have got you know. AmeriCorps, this that . . . we had new state lawyers, you know the much less stressful [work] but getting paid the same money. . . .

You use what you got, to get what you need. Some people will not benefit [from the Court]. It is like any other thing. So if this is how it has to be done, in order to get the money to support programs. . . . They have the wonderful mentoring program. . . .

173. See *supra* note 87 and accompanying text.

174. See *supra* note 87 and accompanying text; see also KELLI MOORE, CTR. FOR COURT INNOVATION, RED HOOK PUBLIC SAFETY CORPS: OPERATION DATA 2001 (2003).

175. See *supra* note 87 and accompanying text.

The good, the bad the ugly and the beautiful, it is all there. We pick out what we can use and what we can't use, and we don't use it. And we have learned how to do that very skillfully, us black people, we can pretend like it is not there. We have been disappointed a lot; we don't trust a lot of people.¹⁷⁶

Others hold a more cynical view, seeing a deception, both in terms of the ability of the court to live up to its word, and its ability to share resources. For example, one young man, Edward, who also runs a youth program said:

Edward: People always write about what they are going to do, they get these proposals, these grants, and for me it is just money-making. Yet the residents and the young people, they are not getting anything out of it. And I think that some people tend to shy away from the focus of the problem out here, they can say we are going to fight drugs, we are going to do this, we are going that, but it is just words, cause you can't fight drugs, cause drugs is controlled by the government.

Researcher: Very defeatist . . . cause you are saying you can't do anything, how could you fight it?

Edward: The way for people to fight it is to just try to continue to encourage people, you know trying to provide more preventive programs out here, cause the drugs is not going anywhere, it has been around for many years and it's not going anywhere. They know it is a serious drug problem out here and this is where crime is at . . . where drugs is at you need some sort of a court system to deal with the crime, to keep it on the hush, but you are not going to eliminate drugs, cause if you eliminate drugs there is no need for a justice center.¹⁷⁷

Edward's comments suggest that, for some residents, the Court is being judged on its ability to keep its promise that it is there for the public good and to improve safety. This was how the Court's founders gained consensus among different community leaders.

One way that the RHCJC hopes to go beyond the impacts of the courtroom alone is through Operation Toolkit initiative, discussed above.¹⁷⁸ This is the Justice Center's major vehicle to help reduce disorder and engage community residents in the co-production of security. The RHCJC advocates Operation Toolkit as another way to restore public confidence in government. Residents bring ideas for Toolkit projects to RHCJC, and some of these ideas are then translated into projects designed to rid the community of health,

176. *See supra* note 87 and accompanying text.

177. *See supra* note 87 and accompanying text.

178. *See supra* note 112 and accompanying text.

safety, and public safety problems. RHCJC then mobilizes public agencies and residents to work collectively to resolve these problems.

The idea is promising and innovative, but the early stages of Toolkit's implementation have been limited.¹⁷⁹ By the end of the research period, the Court had two projects within Red Hook (and others in surrounding neighborhoods discussed later). One was to adopt and clean up the park closest to the courthouse, and to help establish a "Friends of Coffey Park" and other activities that would revitalize it. The Justice Center sent community service crews to the park over the summer to pick up trash. They also organized clean up drives twice a year with AmeriCorps members, and have earned commitments from the Parks Department for improved lighting and groundskeeping. This was one example of a project that could use the different resources of the Justice Center for a positive and productive solution. Friends of Coffey Park was honored as "Park Group of the Year" in 2002 by the New York City Partnership for the Parks.¹⁸⁰ The other project was to clear cars out of an alley directly opposite the RHCJC building, a problem that residents complained about directly to the Court. The project was funded by raising money from RHCJC staff and local residents to hire a tow truck to remove the cars. Residents were pleased with the result (reported in a survey conducted by the court after this project).¹⁸¹ This project, however, did not achieve the goals of community building or innovative problem solving. Community-building would involve the creation of a lasting set of sustainable programs, rearranged institutional relationships, or the contribution of tangible assets or structures. This one-time project to remove abandoned cars had the salutary effect of prettifying the neighborhood and providing a context for NYCHA residents and private homeowners to interact productively. But we were unable

179. The research period ended a few months after Operation Toolkit was launched. The discussion of its implementation should be read as preliminary.

180. BERMAN, *supra* note 112, at 4.

181. The Court's two Outreach Officers distributed a brief, one-page survey to residents on the block where the cars were removed, to gauge resident satisfaction with this action. The survey reported a reduction from eighty-five percent to seventy-six percent in the number of residents who thought that abandoned cars were a problem in the neighborhood, more than eighty percent credited the Justice Center with taking effective measures to fix this problem. The survey was conducted for the Court's internal use, and the survey results are stored at the administrative offices of the RHCHC.

to discern changes in social interactions or lasting contributions from this activity.¹⁸²

Finally, and most importantly, the selection by the Justice Center of which problems to solve has repercussions on the building of the residents' faith in government. If the Justice Center can focus only on smaller "problems," such as clearing out abandoned cars, without taking on larger problems at the same time—such as drug selling and serious violence—it is less likely to restore faith in government, even though it may be commendable at an organizational scale. The Justice Center assumes that these smaller, manageable projects will strengthen its relationship with residents and build legitimacy by addressing small disorder problems that may grow into bigger crime problems. In this way, the Justice Center follows the "Broken Windows" theory that these improvements contribute to public safety.¹⁸³

Meanwhile, residents continue to demand more police presence and better enforcement that targets drug dealers. The RHCJC has limited scope and resources and must make a strategic decision as to where to focus its resources in order to be considered a representative of government that works both in partnership with the community and for its public good.¹⁸⁴ While many individuals in the RHCJC are motivated by their concern for Red Hook, it is not clear if the Justice Center will restore faith in government or whether the Court is just more of the same—a well-meaning government program that fails to deliver what the neighborhood really needs. Currently, Red Hook residents continue to attribute many of their problems to unsatisfactory responses by government agencies, agencies that residents feel could have made an immediate difference, most poignantly the police and the housing authority.

Residents in Red Hook have welcomed the RHCJC as a new government program, but its presence alone does not guarantee its

182. See *supra* note 87 and accompanying text.

183. See GEORGE KELLING & CATHERINE COLES, *FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES* 19-20 (1996); see also James Q. Wilson & George L. Kelling, *The Police and Neighborhood Safety: Broken Windows*, *ATLANTIC MONTHLY*, Mar. 1982, at 29-38 (arguing that unchecked crime leads to multiple crimes by signaling that no one cares about the neighborhood; therefore, by treating small crimes seriously, serious crimes will be less likely to occur). But see BERNARD HARCOURT, *ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING* 88-89 (2001).

184. See Symposium, *Problem Solving Courts: From Adversarial Litigation to Innovative Jurisprudence: Eleventh Annual Symposium on Contemporary Urban Challenges—The Changing Face of Justice: What Works and What Does Not*, 29 *FORDHAM URB. L.J.* 1929, 1953-57 (2002).

legitimacy. People used to failure and broken promises will judge the RHCJC on results. If the Court fails to deliver on its promises to reduce crime, it will be lumped into this local history of failures. Failure will not necessarily generate a protest against the Court, but is more likely to produce anomie and inaction on the part of residents in their decisions to participate in the Court and in the dynamics of informal social control. In this context, case processing and therapeutic programs will continue. But the danger is that the RHCJC could remain a symbol of how government fails to act on residents' articulated needs as opposed to their perceived needs, ultimately turning the Court into what one (cynical) resident renamed it—"a ghetto court"—and defeating its larger goals to the creation of a dynamic that will engage residents in social regulation and control. To sustain community involvement and accrue legitimacy, the Justice Center will have to address the reinforcing cynicism of the neighborhood's unmet expectations.

6. *Conflicting Laws and Policies*

The concept of a multi-jurisdictional court was advocated in the first place as a way that one judge, presiding over three courts, could come to see the same people and provide a more holistic solution.¹⁸⁵ The standard example was of a parent in court with a drug problem, in family court because of a problem with her child, and in housing court due to an inability to pay the rent. These cases have been very rare in the Court's first two years. The confluence of cases within single families, however, raises the risk of conflicting claims on the family's resources and legal status. For example, the Court will have to face the fact that individuals who accept pleas on drug cases may become eligible for eviction from public housing projects, which will bring them into housing court. These problems are cropping up in courts across the country, and the benefit of the doubt in drug-related eviction orders rests with the public housing authorities, as decided by the United States Supreme Court decision in *HUD v Rucker*.¹⁸⁶ While these issues

185. See Scacher, *supra* note 143, at 1.

186. *Dep't of Hous. & Urban Dev. v Rucker*, 535 U.S. 125, 136 (2002) (holding that the federal Anti-Drug Abuse Act, 42 U.S.C. § 1437d(l)(6) (1994), requires lease terms that give local public housing authorities the discretion to terminate the lease of a tenant when a member of the household or a guest engaged in drug-related activity, regardless of whether tenant knew, or should have known, of the drug-related activity). In New York, public housing officials have similar discretion to evict tenants following conviction of co-residents on drug charges. See *Escalera v. N.Y. Hous. Auth.*, 924 F. Supp. 1323, 1343-45 (S.D.N.Y. 1996).

have yet to unfold in the Court, they could force the judge to modify his rulings, or could promote community dissatisfaction focused on the judge and the Court. This is just one example of many that shows how competing interests reflected in law and various layers of the criminal justice system can work against each other in the development of legitimacy. These externalities can impede—if not defeat—efforts of the Court to bring citizens into a closer relationship with the law.

7. *Social Organization and Political Power*

In interviews with senior managers, the RHCJC highlights its community partners and its contribution to the creation of a new generation of leaders within Red Hook. The RHCJC has employed eight former members of AmeriCorps all of whom work in the Justice Center: the AmeriCorps Project Director, the two AmeriCorps team leaders, the mediation director, the Operation Toolkit coordinator, the housing resource center coordinator, and the two community service supervisors. At this level, the Court may be helping individuals and building individual leadership, although the degree of power these individuals have in the running of the Court is limited.

The RHCJC confronted a more complicated situation as it tried to strengthen and create community groups (as opposed to developing individual leadership skills in a few select residents). As the RHCJC became part of the social organization of Red Hook and worked with community leaders, it risked reproducing the same political and social hierarchy that currently exists within and around the neighborhood. These local leaders and groups do not always speak for the majority of Red Hook's residents. For example, we often observed disagreements over re-zoning at local community meetings, where small numbers of well-organized private landlords were pitted against large numbers of other local residents. Although Red Hook is a well-defined geographic neighborhood, this area shares resource with other neighborhoods in Brooklyn. The police precincts, community board, and political districts that include Red Hook in their jurisdictions also encompass wealthier neighborhoods with vocal leaders and demanding residents and businesses (Such as Cobble Hill and Park Slope). This debilitates Red Hook in its most basic struggles for more resources, better services, and improved infrastructure. Red Hook often is forced to compete with wealthier, better-organized communities that possess the social, cultural, and political capital to get

what they need. The RHCJC must beware against reproducing these same fault lines by cooperating mainly with those groups that recognize established interests in the Red Hook neighborhood, thereby marginalizing the broader neighborhood's needs. The RHCJC will have to move well beyond its town hall meetings, infrequent Community Advisory Board meetings, and its annual AmeriCorps survey, to create a sustainable and vibrant forum for democratic participation of local residents in charting the Court's future. If such fault lines persist, these divisions are likely to stand in the way of a full realization of the RHCJC's goals.

One example of the tensions faced by the Justice Center is evident in the way it has had to resolve the issues of the demands between those groups in Red Hook who represent the "gentrifying" class and the majority of the Red Hook residents in the public housing development.¹⁸⁷ The gentrifiers have often come to Community Advisory Board meetings and publicly pressured the Court to help them in their attempts to have traffic laws enforced and to limit the number of trucks coming into the neighborhood.¹⁸⁸ While the Court may be less specifically interested in these issues, these neighborhood groups are well-organized, active at various other community meetings, and vocal in the local press. Accordingly, they cannot be ignored by the Justice Center, and, indeed, have the political skills and access to hijack the Justice Center's limited resources. While the Justice Center tries to ensure that this does not happen, it also faces the fact that a wide range of groups can claim the "community" label to ask for the Justice Center's help.

The RHCJC was designed at the outset to serve Red Hook.¹⁸⁹ But its costs and resources could only be justified if its caseload were larger than what was generated from Red Hook proper. CCI thus expanded the Court's jurisdiction to include cases from throughout the three police precincts that patrol Red Hook: the Seventy-Second, Seventy-Sixth, and Seventy-Eighth precincts. Red Hook cases alone were not sufficient in number to fill the

187. Tara Bahrapour, *Warehouse is an Emblem of Newest Waterfront Battles*, N.Y. TIMES, Feb. 9, 2003, at CY8.

188. See *supra* note 87 and accompanying text.

189. Planning documents for the RHCJC emphasized its embedment in the specific problems of Red Hook. For example, one of its grant applications states, "The Red Hook Community Justice Center, a multi-jurisdictional community-based courthouse, will apply lessons from Midtown to a self-contained, inner-city neighborhood, burdened with problems common in dense, low-income urban neighborhoods throughout the country." Ctr. for Court Innovation, Grant Application to the State Justice Institute (Nov. 1998) (on file with authors). "Justice Center services will be available to anyone who lives in Red Hook—victims, defendants and residents alike." *Id.*

courtroom and justify the transfer of a Legal Aid office, a district attorney's office, court officers, and other personnel. Although the RHCJC is well aware that it serves three very different communities, it still focuses primarily on Red Hook. CCI's first Executive Director explained the rationale:

[D]ecentralization is not [a] perfect thing. . . . you can't spend the money on decentralization and not take a larger area than you would probably like to take. That is just life. You probably could do it, and there are some experiments. I want to do but they are much cheaper experiments many ways but if you are going to do something like what we did in Red Hook. . . . You are going to find that the impacts are different depending on where it is, and that the focused impact is going to be in Red Hook, particularly on the community end. You are going have a more diffuse impact beyond it, and you know that's OK, that is just how it is going to be. That is not to say that you are going to ignore your central core, but I think that you are going to have to be realistic about what you can deliver in Red Hook and what you can deliver in Smith Street in [Carroll Gardens.]¹⁹⁰

Although designed to impact Red Hook, the RHCJC was soon accountable to two additional neighborhoods, including the wealthier Carroll Gardens and Cobble Hill neighborhoods, and Sunset Park, a working class neighborhood with a strong concentration of Latino families in single-family dwellings.¹⁹¹ This was an artifact of the expansion of the RHCJC catchment area to include all three police precincts that have patrol sectors in Red Hook.¹⁹² Senior staff members try to go to community meetings throughout the three areas. The inclusion of these other neighborhoods, however, each with stronger political and social capital, may disadvantage Red Hook in its fight for social and economic resources. At the least, for those in the community who were told that this is the "Red Hook Community Justice Center," it has seemed either confusing, or representative of the way Red Hook is always left behind in reality. One of the leaders of the public housing tenant patrols noted:

190. See *supra* note 87 and accompanying text.

191. N.Y. City Dep't of City Planning, Demographic Tables, *supra* note 71.

192. The Executive Director explained that while the socially and geographically isolated Red Hook neighborhood was the focus of the planning efforts leading to the creation of RHCJC, the low volume of cases from Red Hook alone necessitated an expansion of the catchment area to include all the neighborhoods patrolled by the three police precincts that patrol Red Hook. See *supra* note 87 and accompanying text.

Tenant Patrol Leader: At the time it seemed like a good idea because it was focusing on crime. These people in the project know that if they commit a crime they [are] going to go right here in the back where they have jails and judges. It was only supposed to be the second one in the country, and it was only supposed to be for Red Hook residents. Now I found out that it is for Red Hook, Gowanus, it is for all over the place. And I haven't even heard of anybody being sent back there doing community service in the projects; they are supposed to be doing community service in the projects.¹⁹³

While Red Hook residents may begin to wonder why they are sharing their precious resources with residents in the other neighborhoods when they were finally promised something to help them, some of the interviews still show Red Hook residents asking why Red Hook has received this Court and what good it does them.¹⁹⁴ At the same time, the situation can be confusing for other residents in the precincts processed at the RHCJC. One young man from Gowanus Housing in Cobble Hill was arrested on a trespass charge in the housing development and mandated to a treatment readiness group. He was impressed with the fact he could get acupuncture and attend this group therapy, but lamented that he had to come to Red Hook for this, and asked what good that was for him living elsewhere.¹⁹⁵ As administrative lines draw the boundaries that define these programs and new institutions, these boundaries can conflict with local understandings of neighborhoods in need.

Red Hook suffers not only from the fact that it has a small number of active community leaders who maintain a rigid hold on local power and resources,¹⁹⁶ but also because the community has lacked the numbers and the political voice to command the resources it needs. The RHCJC inadvertently continues this tradition by broadening its focus to the surrounding neighborhoods. For example, when soliciting at the Community Advisory Board meeting for "problems" to solve through Operation Toolkit, both community leaders from Red Hook and other interested parties from the surrounding neighborhoods offered suggestions and voiced their concerns. One was a member of a local economic development corporation who discussed the noise problem being created by up-

193. See *supra* note 87 and accompanying text.

194. See *supra* note 87 and accompanying text.

195. See *supra* note 87 and accompanying text.

196. Kasinitz & Rosenberg, *supra* note 9, at 182-84

scale restaurants and bars in Smith Street in Cobble Hill.¹⁹⁷ This street is now one of the most fashionable Brooklyn streets, and has little to do with Red Hook. RHCJC staff offered their services to help mediate between the businesses, talk to residents, work with cab companies, the police, and mediation services.¹⁹⁸ While these are all solutions, this diverts resources and attention that might otherwise be focused on Red Hook. Another member of the local economic development group who was also the head of the Police-Community Precinct Council, asked for a community service project to (re)paint the iron work in a local park in Cobble Hill.¹⁹⁹ This park lies amongst million dollar homes. A crew was immediately dispatched in days and local newspapers came to photograph defendants "cleaning up the community." Even though the bulk of the community restitution projects have targeted the Red Hook neighborhood, none have generated this type of media attention.

These developments created contradictions for the RHCJC between the political and social organization of Red Hook, the inherent tensions between components of the criminal justice system, and the theoretical foundations of therapeutic jurisprudence, individualized justice, and problem solving that are intrinsic to community courts and community justice centers.²⁰⁰ These concepts connect community and defendant in their shared concerns and social norms. In the end, the Court's pursuit of legitimacy could suffer as defendants lose sight of these connections and as the Court stretches its philosophy to accommodate dynamics launched from the political economy of a "contested" community.²⁰¹ These developments threaten to compromise the moral communication component of the Court's unique form of sanction. As it tries to "heal" the problems of crime, drugs, and social disorder in Red Hook, other groups have made claims on the Justice Center, all in the name of "community." How the Court decides to use its limited resources, whose problems will be solved and how, are questions that will have repercussions on the Court's role in each of the communities that claim it as their own.

197. See *supra* note 87 and accompanying text.

198. See *supra* note 87 and accompanying text.

199. See *supra* note 87 and accompanying text.

200. Thompson, *supra* note 5, at 83-92.

201. CRAWFORD, *supra* note 2, at 148-64.

CONCLUSION

The RHCJC has created a new court and a new organizational form for the integration of justice and social services. It has expanded the power of the judge in ways that might be understood by many to work for the public good—despite the objections of some defendants and the defense bar.²⁰² Although beneficial and admirable in many ways, the example of the RHCJC suggests that efficiency and partnerships with service providers and community leaders does not necessarily generate a legitimate social institution. Community courts offer an alternative to the inefficient downtown court systems and a balance on the alienating power of the uncaring judges. Yet these courts face complex social histories and political dynamics that are far more complex than those faced by traditional centralized courts. Thus, these new courts take on a huge responsibility. Their broad agenda and inclusiveness raise expectations among local residents who may be difficult to reach. In struggling to reach these goals, community courts risk forgetting their obligations for due process, fairness, and results.

The RHCJC was designed to help rehabilitate a troubled neighborhood by enhancing its capacity for social control. The Community Justice Center approach to crimes of “incivility” and “disorder” was constructed as a promising strategy for not only rehabilitating low-level offenders, but also for revitalizing the neighborhood itself.²⁰³ The community justice model conceptualizes sanctioning as part of a healing process—one where the community, the victim, and finally the offender, are simultaneously healed. Sanctions are part of a larger process of restorative justice and are fashioned according to their ability to do this, as opposed to being cast within the rehabilitative or punitive ideal. Although originally designed to provide a creative and rich mix of social and rehabilitative services to citizens with a variety of legal entanglements and social problems living in a disadvantaged neighborhood the Red

202. Davis, *supra* note 136, at 36. The tension derives from the fact that the attorney-client privilege is not suspended in problem-solving courts. The risk is that the drug court “team” members may see a client or her lawyer as uncooperative if counsel fails to disclose client confidences that can be disclosed only under a waiver of the protections of 42 C.F.R. Such disclosures are routine in treatment, but not necessarily in court. See Caroline S. Cooper, *Letter to the Editor*, 89 A.B.A. J., Apr. 2003, at 12-14. The National Association of Drug Court Professionals also stated that there is no dilution of the ethical zealousness of a defense attorney in a problem-solving court, noting that a guilty plea has no particular therapeutic value. The National Legal Aid and Defender Association has endorsed this stance. See H. Scott Wallace, *Letter to the Editor*, 89 A.B.A. J., Apr. 2003, at 12-14.

203. SVIRIDOFF ET AL., *supra* note 4, at 12-14.

Hook Community Justice Center relies heavily on drug treatment to address residents' complex personal problems that do not easily fall into a simplified medical treatment paradigm. Despite its notable achievements—Operation Toolkit, the integration of AmeriCorps volunteers into the neighborhood, efforts to intervene in the recurring housing tensions between the NYCHA and Red Hook's poor, the pursuit of individualized justice and remedial interventions for defendants—the Justice Center remains focused on milling the neighborhood's "disorderly"—the loiterers, the publicly intoxicated—into drug treatment of uncertain effectiveness.²⁰⁴ Still, it produces more than "enough justice"—what Rawls terms "the good"—to affirm its founding principles.²⁰⁵

The early history of the Court reveals the challenges that are the product both of unforeseen and distant externalities in policy and political economy, and internal struggles to adapt to the supply of cases that arrive at its door. In responding to these challenges, the Justice Center created its own forms of sanctions and social control. These new forms of punishment are designed to take place in a context of "community empowerment," where arrest, prosecution, and punishment of offenders are designed to rid the communities of their social problems and to engage citizens in the dynamics of social control and regulation. Here the goal is to increase "community" participation in crime fighting, with a residual goal being to improve relations with the residents in the neighborhood in which formal control operates.²⁰⁶ Enlisting the community in the process of social control has been difficult for the Justice Center, however, as it often is in poor neighborhoods such as Red

204. See, e.g., D. Dwayne Simpson et al., *A National Evaluation of Treatment Outcomes for Cocaine Dependence*, 56 ARCHIVES GENERAL PSYCHIATRY 507, 507 (1999) (showing that treatment effectiveness is greater in inpatient treatment compared to outpatient counseling of the type offered to most of RHCJC's treatment referrals); see also STEVEN BELENKO, NAT'L CTR. ON ADDICTION & SUBSTANCE ABUSE AT COLUMBIA UNIV., RESEARCH ON DRUG COURTS: A CRITICAL REVIEW 2001 UPDATE 5-7 (2001) (showing that the research designs used in most drug court research are insufficient to claim that there are significant reductions in drug use or crime among drug court defendants compared to similarly situated defendants in other courts or to voluntary drug treatment participants), available at http://www.casacolumbia.org/usr_doc/researchondrug.pdf (last visited Mar. 15, 2003); U.S. GENERAL ACCOUNTING OFFICE, DRUG COURTS: BETTER DOJ DATA COLLECTION AND EVALUATION EFFORTS NEEDED TO MEASURE IMPACT OF DRUG COURT PROGRAMS, GAO-02-434, at 2-3 (2002) (stating that the available data is insufficient to claim that court-ordered drug treatment is effective), available at <http://www.gao.gov/new.items/d02434.pdf> (last visited Mar. 15, 2003).

205. RAWLS, *supra* note 119, at 393-97.

206. Kurki, *supra* note 22, at 1.

Hook.²⁰⁷ The Justice Center's efforts to enlist Red Hook residents in active forms of social control is challenged by Red Hook's social exclusion and concentrated poverty, and is likely to remain an elusive goal until these larger structural conditions change. The reasons speak to the complexities of creating a new legal institution in a neighborhood operating with strong deficits of social capital, social cohesion, and collective efficacy, the threads of the fabric of community that are essential to social control.²⁰⁸ The danger is that the Court will simply use the Red Hook community as symbolic partners,²⁰⁹ thus reinforcing the legacy of broken promises that characterizes Red Hook's relations with the government over decades. For now, the RHCJC remains caught in the laudable and ambitious nature of its goals

The Red Hook Community Justice Center illustrates the challenges that community justice centers face in their attempts to create unique institutions to re-legitimize legal institutions at the local level. The therapeutic ethos of the Court offers a source of legitimation, reinforcing traditional codes of moral communication and understanding.²¹⁰ The Justice Center enjoys a strong comparative advantage in procedural justice—justice as felt and experienced—over the large, fractured, and impersonal centralized courts, and reaps yet another quantum of legitimacy. The partnership with community and solving local problems of crime and disorder also is an engine for legitimacy. This legitimacy is central to the concept

207. See, e.g., Sampson et al., *supra* note 57, at 918-24 (showing how concentrated poverty can undermine the active participation of neighborhood residents in the social regulation of antisocial behavior); Tom R. Tyler, *Trust and Law Abidingness: A Proactive Model of Social Regulation*, 81 B.U. L. REV. 361, 364, 406 (2001); see also Bursik & Grasmick, *supra* note 57, at 35-38 (discussing the roles of neighborhood residents in a systemic theory of social control that integrates formal legal and informal social control of delinquent behavior)

208. See Bursik & Grasmick, *supra* note 57, at 15-18, 150-57; Sampson et al., *supra* note 57, at 918-24.

209. See Kurki, *supra* note 22, at 3 (arguing that that challenge for government will be to encourage and support the new initiatives without stifling the spontaneity, creativity, and grassroots ties that are their strengths).

210. See Nolan, *supra* note 24, at 58. Nolan cites Judith Kaye, Chief Judge of the New York State Court of Appeals: "Courts today face a public that, by and large, is cynical and distrustful of all government, including the judicial system." Judith S. Kaye, *Lawyering for a New Age*, 67 FORDHAM L. REV. 1, 3 (1998). The engine for generating legitimacy, according to Nolan, is the appeal to dominant cultural values. See Nolan, *supra* note 24, at 15. Whether those values are individually responsible for one's crimes, or the beneficence of the court and its continued embrace of rehabilitation and redemption for minor offenders, depends on which culture and which values. The dominant culture on crime is anything but homogeneous. See Garland, *supra* note 27, at 139-93.

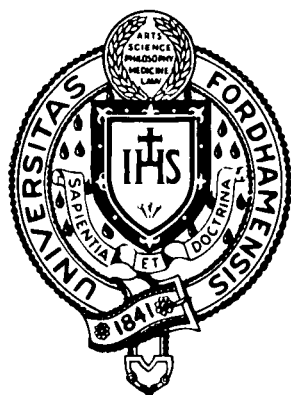
of leveraging felt justice into social control, and to engaging citizens in partnership with police to enforce social norms and laws. The gamble in this design is that citizens will see this arrangement as promoting a model of common good over simple fairness and efficiency in the courts. Residents are most likely to comply in this arrangement when they see the Court as a legitimate institution that works for the good of the community, not simply as a structure to repair problems of inefficiency in the court system. In the context of a community court, social control is a problem of both collective action and systems of mutual accountability.²¹¹ The Justice Center will be challenged to engender new forms of social control without this legitimacy.

211. For discussions of collective action and police-citizen interactions, see Dan Kahan, *Reciprocity, Collective Action, and Community Policing*, 90 CAL. L. REV. 1513, 1524-25, 1529 (2002); Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1168-69 (2000).

APPENDIX A

Table 1 Social and Legal Services at the Red Hook Community Justice Center			
Social Services			
<i>Partners/Services</i>	<i>Role/Function</i>	<i>Description</i>	<i>Onsite Presence</i>
Clinic (CCI)	Counselors and Social Worker	Drug treatment, social service and mental health referrals; batterers' programs; case management; counseling sessions; anger management classes	Clinic onsite
Phoenix House	Total Abstinence Drug Treatment	Treatment Readiness program; referrals to Phoenix House inpatient treatment; youth development and drug education group	Three counselors onsite
Board Of Education	Teacher	Morning classes and two evening classes; college scholarship help	Teacher and assistant is onsite mornings; guidance counselor one day per week
E.D.N.Y.	Addiction Counseling	Three hour marijuana class, twice a week	Employee comes in twice a week to give group
Victim Services	Victim Assistance	Advise victims; housing referrals; security assistance; assist with obtaining restitution	Staff member onsite
CCI Staff/Victim Services	Mediation	Mediation services to resolve disputes	Day and evening schedule
Youth Court (CCI)	Youth Development & Crime Prevention	"Peer" judging in the form of a court, for teens	Two evenings a week, full-time onsite staff
AmeriCorps (CCI)	Youth Volunteer Program	Youth volunteers are placed around South Brooklyn	Office onsite
Fifth Avenue Committee	Community Organization	Job placement and training referrals; resumé advice	Office in Basement
Good Shepherd Services	Youth Social Worker	Counseling to advise youth of Good Shepherd and other services	One full time staff onsite
Health Education	Health Education Counselor	Weekly groups for prostitutes and another for "johns" used as a court mandate	Group twice per week
Housing Resource and General Information (CCI)	CCI employee	Housing information; legal advice and referrals; advocate for needed repairs	Office onsite, one staff person
Day Care Center (CCI)	Staffed by AmeriCorps and Safe Horizon	Available to defendants using RHCJC services	Weekdays

Park Slope Safe Homes	Counselor	Domestic Violence Counseling and Advice	Twice a week (Started December 2001)
Community Health Network	Health Clinic	Left RHCJC December 2001	N/A
Center for Employment Opportunities	Job Readiness Course	Left RHCJC December 2001	3 mornings a week until departure
H.R.A.	Public Assistance Screening and Enrollment	Assistance with TANF, SSI, other income support, and human resources	2 days per week
Mentoring (CCI)	Youth Development	Mentoring program for local high school and middle school students	Office onsite
Criminal Justice Services			
<i>Agency</i>	<i>Role/Function</i>	<i>Description</i>	<i>Onsite Presence</i>
Legal Aide	Defense	In Court	Office onsite
District Attorney's Office	Prosecution	In Court	Office onsite
Probation	Officers	Sees defendants from court, and also monitors juvenile cases	3 staff persons onsite



DUE PROCESS AND PROBLEM-SOLVING COURTS

Eric Lane*

INTRODUCTION

The rapid proliferation of “problem-solving courts,” particularly of drug courts, occasions this Article. These progeny of the 1989 Dade County, Florida drug court¹ can be found throughout the country. According to one report, there are approximately 500 drug courts operating nationwide, with several hundred more coming on line.² From these drug courts, a number of other courts have evolved, all under the problem-solving handle. In New York, for example, in addition to drug courts, there are community courts and domestic violence courts.³ In the State of Washington there is a mental health court.⁴ While disparate in their focus, their “problem solving” characterization appears to result from a shared, urgent common goal of judicially addressing problems deemed, usually by the court, as not adequately addressed through the quotidian mills of, at least, the overloaded urban criminal justice system. Chief Justice Kathleen A. Blatz of the Supreme Court of the State of Minnesota has forged a palpable description of this problem-solving stimulus:

I think the innovation that we’re seeing now is the result of judges processing cases like a vegetable factory. Instead of cans of peas, you’ve got cases. You just move ‘em, move ‘em, move ‘em. One of my colleagues on the bench said: “You know, I feel

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1. For a general discussion of the rise of problem-solving courts, see GREG BERMAN & JOHN FEINBLATT, CTR. FOR COURT INNOVATION, PROBLEM-SOLVING COURTS: A BRIEF PRIMER (2000). For the edited transcripts of two discussions on problem-solving courts, sponsored by the Department of Justice and the Center for Court Innovation, see Colloquium, *What is a Traditional Judge Anyway? Problem Solving in the State Courts*, 84 JUDICATURE 78 (2000) [hereinafter *Problem Solving in the State Courts*]; Colloquium, *What Does it Take to be a Good Lawyer? Prosecutors, Defenders and Problem-Solving Courts*, 84 JUDICATURE 206 (2001) [hereinafter *Prosecutors, Defenders and Problem-Solving Courts*]. The Author moderated the first discussion and observed the second.

2. BERMAN & FEINBLATT, *supra* note 1, at 4.

3. *Id.* at 3.

4. *Id.*

like I work for McJustice: we sure aren't good for you, but we are fast."⁵

This emergence of problem-solving courts as an alternative to "McJustice" has begun to engender debate over the three foundational premises on which problem-solving courts rest: first, courts are appropriate institutions for solving the undertaken problems; second, the resources commanded for this problem-solving do not shortchange the resolution of more important but more complex problems; and third, the problem-solving protocols employed by these courts are effective.⁶

While the outcome of this debate is of enormous importance to the continued existence of problem-solving courts, there is another important question. That question is whether problem-solving courts can be effectively maintained without damage to the individual protections afforded defendants under the due process mantle of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and under similar provisions found in state constitutions.

This question arises primarily in a theoretical and speculative context because little empirical work has been done on the subject. There have been few reported cases challenging problem-solving courts' jurisdiction or procedure, and there is no consistent picture of the procedures necessary for the operation of a problem-solving court generally or for a particular type. The question is engendered by the sense expressed by both advocates and critics that problem-solving courts require a different role for judges, and perhaps lawyers, than that required by traditional courts. This difference is sharply expressed in the following remarks of Judge Cindy Lederman, the first judge in the Dade County drug court, and Professor Richard Cappalli, at the December 3, 1999 forum on problem-solving courts:

Hon. Cindy Lederman: If we as judges accept this challenge, we're no longer the referee or the spectator. We're a participant in the process. We're not just looking at the offense any more. We're looking more and more at the best interests, not just of

5. *Problem Solving in the State Courts*, *supra* note 1, at 80; *see id.* at 82 (quoting Chief Judge Judith Kaye of the New York Court of Appeals, "[Judges] are excited about this not because they are re-engineering the world, but because they feel they are exercising a meaningful role as a judge."). *See generally* BERMAN & FEINBLATT, *supra* note 1.

6. John Feinblatt et al., *Judicial Innovation at the Crossroads: The Future of Problem-Solving Courts*, 15 CT. MANAGER 28, 28 (2001).

the defendant, but of the defendant's family and the community as well.⁷

Cappalli: When judges move out of the box of the law and into working with individual defendants, transforming them from law-breaking citizens into law-abiding citizens, we have to worry. Because what has always protected the bench has been the law. . . . If we take the mantle of the law's protections off of the judges and put them into these new roles, we have to worry about judicial neutrality, independence, and impartiality.⁸

The broad question then for this Article is whether Judge Lederman's proactive problem-solving judge can judge in a manner consistent with the protection of a defendant's due process rights, or whether there is something in this problem-solving rendering of a judge's function that must undermine those protections.

As noted earlier, there is little evidence on which to form a full, realistic picture of the practices of problem-solving courts. Hence, the analysis and conclusions will be hypothetical. The "facts" for this Article include: first, three case studies, The Stanford Drug Treatment Court ("Drug Court"), The Brownsberg Community Court ("Community Court"), and The West Jackson Domestic Violence Court ("Domestic Violence Court"), each containing several illustrations of typical issues that each court addresses, prepared by the Center for Court Innovation⁹ as the "factual" basis for two discussion groups convened by the United States Department of Justice to discuss problem-solving courts; second, the edited, published transcripts of these discussions;¹⁰ and third, the occasional literature on problem-solving courts. As for the case studies, they were not intended to provide a full picture of what was happening in each of the courts from which they were drawn.¹¹ The goal of each was to highlight and invite discussion on some aspect of each court's procedure, which the Center judged might be con-

7. *Problem Solving in the State Courts*, *supra* note 1, at 80.

8. *Id.* at 82.

9. The Center for Court Innovation is an independent research and development entity of the New York Court System and was responsible for the planning and implementation of numerous problem-solving courts. The case studies were prepared by the Center's staff in consultation with a number of problem-solving court participants. A number of staff members and outside readers also reviewed the studies. The Author served as one of those readers.

10. *Problem Solving in the State Courts*, *supra* note 1; *Prosecutors, Defenders and Problem-Solving Courts*, *supra* note 1.

11. See CTR. FOR COURT INNOVATION, CASE STUDY: STANFORD DRUG TREATMENT COURT 1 n.1 (1999) [hereinafter DRUG COURT]. The Case Study is reprinted in Appendix 1 with permission from the Center for Court Innovation.

sidered unique or of concern.¹² Their goal was to provoke a critical exploration “before they enter the mainstream” of whether “problem-solving courts [are] any less protective of individual rights than the typical state court?”¹³

After reviewing this material, this Article takes the view that, with certain cautions, problem-solving judging and lawyering, as described by the case studies and other available material, need not be in conflict with due process standards. The cautions relate to the level of judicial activism pictured in each of the case studies, particularly the ones describing the community court and the domestic violence court. If such level of engagement needs to be maintained for the continuation of these courts, it could raise serious questions about judicial independence and impartiality. Of particular concern is the community advisory board, which seems intended to establish a judicial bias. Also problematic is the requirement that domestic violence defendants attend batterer’s programs. Arguably, this is punishment that cannot be constitutionally justified.

I. AN EXCURSUS FOR COMPARISON

As noted earlier, the spark that charges this due process inquiry results, at least in part, from the rub between Judge Lederman’s and Professor Cappalli’s competing judicial portraits. Such a comparison casts an unfavorable shadow on problem-solving courts because of the inherent suggestion that, whatever they are, they are lesser judicial institutions than are traditional courts. This, of course, could negatively influence any study of the due process afforded by problem-solving courts. But such a comparison misses the mark. Problem-solving courts should not be measured against the standards of the “traditional” courts, but against the backdrop of Judge Blatz’s McJustice courts.

The Sisyphean goal of these traditional courts is to clear the chronically over-clogged calendars of urban criminal courts by trading lighter sentences for guilty pleas in a vast number of cases. And these calendars have continued to grow.

[T]he caseload increase in the state courts has been staggering. Take domestic violence, for example. From 1984 to 1997, the number of domestic violence cases in state courts increased by 77 percent. Or look at drugs: national research reveals that as

12. *Id.*

13. See Feinblatt et al., *supra* note 6, at 28.

many as three out of every four defendants in major cities test positive for drugs at the time of arrest. The story is no different for quality-of-life crime. In New York City, for example, over the past decade the number of misdemeanor cases has increased by 85 percent.¹⁴

Chief Judge Judith Kaye of the New York State Court of Appeals describes the judicial role in New York's urban criminal courts as "pleading cases at arraignment,"¹⁵ a portrait confirmed by Judge Legrome Davis who described how, in one year, he "had 5,000 felony defendants plead in front of me and get sentenced."¹⁶

The image is of a revolving door in which a large percentage of offenders continuously spend a part of their time offending and part of their time in jail, apparently waiting to offend again. As Chief Judge Kaye has noted, "[W]e're recycling the same people through the system. And things get worse. We know from experience that a drug possession or an assault today could be something considerably worse tomorrow."¹⁷

The goal of the problem-solving courts is to provide an alternative to this revolving door, assembly line approach to "justice."¹⁸ In the case of the drug court, the defendant is offered a treatment program instead of incarceration.¹⁹ The goal is to rid the offender of her addiction.²⁰ In the case of the community court, the defendant is punished for low-level crimes that usually fly below the criminal justice radar screen. The punishment is usually some form of community service. The goal is to restore a sense of order to the community, and secondarily, through selected social programs, to restore a sense of order to the offender. In the case of domestic violence courts, the defendant is constantly monitored prior to the case's disposition. The goal of this monitoring is to provide safe harbor to the victim and make an offender accountable for her conduct.

In each case, the defendant can refuse the alternative treatment. A defendant in a drug court can refuse the treatment, thus subjecting herself to the McJustice system. Similarly, a community court defendant can choose to be processed by the regular system. Finally, a domestic violence court defendant can refuse the monitor-

14. *Id.* at 29.

15. *Problem Solving in the State Courts*, *supra* note 1, at 82.

16. *Id.* at 80.

17. *Id.*

18. See BERMAN & FEINBLATT, *supra* note 1, at 6.

19. *Id.* at 4.

20. See *id.* at 3.

ing program, which most likely will subject him to pre-trial detention or high bail. This is not to deny the pitfalls of such a step, including long pre-trial incarceration, but only to state that what is thought of as the “traditional court” remains available to defendants.

The questions then become whether any of the procedures employed by the problem-solving courts are unique (vis-à-vis the McJustice courts), and, if so, what due process concerns such procedures implicate. Finally, if such procedures raise serious due process concerns, whether they constitute bad practices, subject to remedy, or whether they are an essential element for maintenance of problem-solving courts.

II. DUE PROCESS IN THE PROBLEM-SOLVING COURTS

The following Sections discuss the due process issues raised by problem-solving courts, as presented by the case studies. For the most part, these issues are procedural, raising the question of whether a particular procedure undermines the state’s obligation to guard against an erroneous deprivation of defendant’s liberty.²¹ The Domestic Violence Court Case Study also raises a substantive due process question, namely whether the required predisposition attendance at a batterer’s program is in fact punishment.²²

The questions arise from two, perhaps unique, characteristics of problem-solving courts, at least as described in the case studies. The first is the reliance that problem-solving courts, at least the drug and community courts, apparently place on collaborative approaches to the problems they were created to address. In the Drug Court Case Study the term used is the “teamwork” approach.²³ Such an approach raises questions concerning the role of the defense lawyer in the required plea bargaining and in subsequent proceedings. It also raises questions concerning the impartiality and independence of the judge in the acceptance of any such

21. See *People v. David W.*, 95 N.Y.2d 130, 136 (2000) (citing *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976)). As should be noted from these cases, this Article applies the reigning instrumentalist approach to due process. In other words, the question is whether on balance and contextually the procedures requested reduce the possibility of an erroneous deprivation, and not whether or not the procedures are fair.

22. “So-called ‘substantive due process’ prevents the government from engaging in conduct that ‘shocks the conscience,’ or interferes with rights ‘implicit in the concept of ordered liberty.’” *United States v. Salerno*, 481 U.S. 739, 746 (1987) (citations omitted).

23. The subject will be discussed *infra* Part III.

plea and the imposition of sentence. What is the impact of the collaborative approach on a defendant's right to effective counsel,²⁴ or on a defendant's right to have an impartial judge weighing the voluntariness and intelligence of the plea?²⁵

The second characteristic is the active judicial role that all problem-solving courts envision for their judges.²⁶ Judge Cindy Lederman, a founder of the groundbreaking Dade County Florida drug court, has emphasized (and perhaps overemphasized) this role: "Well, one thing, I'm not sitting back and watching the parties and ruling. I'm making comments. I'm encouraging. I'm making judgment calls. I'm getting very involved with families. I'm making clinical decisions to some extent, with the advice of experts."²⁷

In the case studies, this activism translates into different forms of judicial conduct. In the drug court study, the question is whether the judge can be impartial; in the community court study, the question is whether the judge can be independent; and in the domestic violence study, the question is how far the judge can go to protect the complainant. The case studies contain common issues. For example, the concern surrounding the right to effective assistance of counsel raised in the drug court also could be raised in the community court. Unless the analysis would lead to a different conclusion, these issues are not discussed in any detail more than once.

III. THE DRUG COURT

A. Description

An explosion of drug-related crimes and high recidivism rates pushed Stanford's Judge Frank Smith to reexamine his judicial role. "If addiction was driving the majority of his caseload, shouldn't the court be doing something about it?"²⁸ The result of this reexamination was the establishment of a drug treatment court. The Stanford model drug court uses a "teamwork" approach; the team consists of the judge, the prosecutor, defense counsel, court social workers, and off-site treatment providers.²⁹

24. See *Strickland v. Washington*, 466 U.S. 668, 691 (1984) ("An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.").

25. See *North Carolina v. Alford*, 400 U.S. 25, 31 (1970) (holding that the standard for the validity of plea bargains is a voluntary and intelligent choice among defendant's alternatives).

26. See BERMAN & FEINBLATT, *supra* note 1, at 8-9.

27. *Problem Solving in the State Courts*, *supra* note 1, at 82.

28. DRUG COURT, *supra* note 11, at 2.

29. *Id.* at 3.

Prosecutors are the gatekeepers to the drug court, using eligibility guidelines that basically reduce drug-related charges to nonviolent charges.³⁰ Once a defendant is routed to a drug court, she is initially assessed by a court-retained social worker, who makes treatment recommendations.³¹ The information gathered by the social worker is then subject to a waiver "allowing for a limited disclosure of information."³² Counsel does not participate in defendant's decision to sign the waiver.³³ The treatment providers chosen by the court employ both in- and out-patient treatment methodologies, which can last for several years.³⁴ Considerable information passes between the program administrators and the courts concerning court-sentenced patients.³⁵ A determination of eligibility is translated to a plea offer in which the defendant is offered drug treatment in return for a guilty plea to some specified offense.³⁶ The plea is conditioned upon a "backup" sentence in the event that the treatment is not successfully completed, or a dismissal of the charge if the treatment is successfully completed.³⁷ The plea is reduced to an agreement that contains the sanctions for noncompliance, which include, as a last resort, sentencing for the pled-to crime and several interim sanctions that "run the gamut from writing essays to sitting in the courtroom all day to spending a week in jail."³⁸

B. A Teamwork Approach to Plea and Sanction³⁹

The defendant, Rogers, has been charged with distributing cocaine and faces a maximum of twenty-five years if he is convicted of the top count in the indictment. Defense Counsel Simkins informs Rogers of a treatment diversion offer made by the prosecutor. Under its terms, Rogers would plead guilty to a lesser felony count, and enter an eighteen-month in-patient drug treatment program. If Rogers successfully completes the program the charges against him would be dismissed. If he fails to complete the pro-

30. *Id.*

31. *Id.* at 4.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. The following scenario was taken from CASE STUDY: STANFORD DRUG TREATMENT COURT. See App. 1.

gram, he would serve thirty-six months incarceration. As part of the discussion of the plea, the following exchange occurs:

Rogers: Look, I know they found twelve rocks in my shoe when they searched me. But I thought you said you could try to get the case thrown out.

Simkins: Well, nothing is certain, but you do have a pretty good Fourth Amendment issue. If the judge agrees that the police didn't have the right to stop you. . . . But . . . you would be taking a real risk by going forward on a motion to suppress. If the judge didn't throw out the evidence, you'd be back where you are now, except the amount of time you'd be facing would probably be more. . . . Right now, even though under the statute you can get up to ten years in jail for possession with intent to distribute cocaine, the government has agreed that your "back up" time would only be 36 months. . . . That's if you take the deal today. . . . Let me be clear: you can always ask for treatment in this court, but the longer you wait, the more time you would likely face if you don't follow through with your program.

. . .
Rogers: Can they do that? Try and force me to get treatment? . . .

Rogers: Well, what do you think I should do? . . . You're my lawyer.

Simkins: The ultimate decision has to be yours Mr. Rogers. . . . I think you have a really good suppression issue—not a slam-dunk, but good. Aside from the legal questions, though, you should ask yourself what you think is best for you. Even if we got this charge dismissed, where would you be? You told me you thought you needed to clean up. Here you have been given the chance to get off the street for a while. I'm not saying it would be easy—you'd have to come back to court every two weeks, do drug tests all the time, and lose your freedom for a while. It's a good deal, though, if you can make it through.

Rogers: So, if I test dirty, then I've gotta do the time?

Simkins: No, you won't fail out with a few dirties; but you will face sanctions. . . .

Rogers: Man, I don't know what to do. . . . A year and a half in a program is a long time, especially if I still might wind up doing time anyway. But, I do want to start cleaning up. . . .

Simkins: Well, think about it. Your case won't be called for about another fifteen minutes or so.⁴⁰

Rogers then agrees to the plea. There is no reference to the Judge's conduct in accepting the plea. The decision to take a plea,

40. *Id.* at 5-6.

even in return for a lesser sentence or a treatment alternative, is a grave decision in our criminal justice system, the "most important single decision in any criminal case."⁴¹ As the Supreme Court has written:

That a guilty plea is a grave and solemn act to be accepted only with care and discernment has long been recognized. Central to the plea and the foundation for entering judgment against the defendant is the defendant's admission in open court that he committed the acts charged in the indictment [or to lesser charges]. He thus stands as a witness against himself and he is shielded by the Fifth Amendment from being compelled to do so—hence the minimum requirement that his plea be the voluntary expression of his own choice. But the plea is more than an admission of past conduct; it is the defendant's consent that judgment of conviction may be entered without a trial—a waiver of his right to trial before a jury or a judge. Waivers of constitutional rights not only must be voluntary, but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.⁴²

In the plea bargaining process, the role of the defense counsel is to make an independent examination of the facts, circumstances, pleadings, and laws involved, and then to offer his informed opinion as to what plea should be entered.⁴³

Simkins' eagerness for Rogers to accept the treatment model borders on the aggressive, raising the ethical question of whether the lawyer is making the plea decision for the client.⁴⁴ But, in and of itself, this exchange between lawyer and client raises no due process questions unique to drug courts. Any lawyer may push a defendant, even too hard, in a particular direction. A defendant can later challenge that effort as ineffective assistance of counsel,

41. 1 ANTHONY G. AMSTERDAM, TRIAL MANUAL 5 FOR THE DEFENSE OF CRIMINAL CASES § 201, at 339 (1988).

42. *Brady v. United States*, 397 U.S. 742, 748 (1970) (citations omitted).

43. *See Von Moltke v. Gillies*, 332 U.S. 708, 721 (1948); *see also* MODEL CODE OF PROF'L RESPONSIBILITY EC 7-7 (1992) (stating that a defense lawyer in a criminal case has the duty to advise her client fully on whether a particular plea to a charge appears to be desirable); Steven Zeidman, *To Plead or Not to Plead: Effective Assistance and Client-Centered Counseling*, 39 B.C. L. REV. 841, 841-49 (1998) (arguing that defense counsel must provide an informed opinion, but that this standard is loosely enforced by the courts); discussion *infra* notes 71-73 and accompanying text.

44. *See* MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (1998) (requiring a lawyer to abide by client's plea decision after consultation); *see also* N.Y. CODE OF PROF'L RESPONSIBILITY Canon 7 (noting the absence of any prohibition on lawyers seeking treatment for a client as part of plea bargaining, but further noting that nothing should compel defendant to plead guilty).

claiming that the defense counsel did not simply offer an opinion, but rather coerced the defendant into accepting it.⁴⁵ Success in such challenges is unlikely. As one court has written, “[a]dvice—even strong urging by counsel—does not invalidate a guilty plea.”⁴⁶ And well it should not, if the McJustice system, which depends upon pleas, is to continue. A lesser standard would lead toward the chaotic. As the Supreme Court has described:

The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel’s unsuccessful defense. Counsel’s performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.⁴⁷

What is of concern here, though, is not the pressure commonly applied by a defense counsel to secure a plea that, hopefully, she thinks is appropriate, but the avowed “teamwork” overlay on that pressure. This raises the more fundamental question of the defense counsel’s independence.

In the representation of a defendant, “counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest.”⁴⁸ If such a teamwork approach, in fact, requires a defense counsel to push a defendant towards treatment, regardless of facts underlying the charges, such a standard cannot be satisfied. The term “in fact” is used to recognize that under the reigning effective counsel doctrine, the primary question is whether there has been “actual ineffective assistance of counsel.”⁴⁹ In other words, even assuming an

45. A defendant’s chances of succeeding in such a claim are very limited. The courts have given lawyers wide latitude. See *United States v. Rodriguez*, 929 F.2d 747, 753 (1st Cir. 1991) (holding that allegations of ineffective counsel were not sustainable solely because of the defendant’s claim of coercion to decline plea offer); see also Zeidman, *supra* note 43, at 869-70 (discussing the courts’ treatment of the defendant’s claim of ineffective counsel because of coercion).

46. *Williams v. Chrans*, 945 F.2d 926, 933 (7th Cir. 1991) (quoting *Lunz v. Henderson*, 533 F.2d 1322, 1327 (2d Cir. 1976)).

47. *Strickland v. Washington*, 466 U.S. 668, 690 (1984).

48. *Id.* at 688.

49. *Id.* at 684. The test in *Strickland* is twofold: first, the defendant must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. *Id.* The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of

actual oath of fealty to the teams and its goal of drug treatment, it would seem that, under *Strickland*, the defendant would have to establish that the defense counsel obeyed such an oath, or otherwise acted as an agent of the team in that particular case.

Of course, it is doubtful that such team allegiances and efforts are so sharply cast. Few within the criminal justice system would abide by such palpably violative conduct. More likely, the team approach signifies a common understanding of how to resolve certain types of cases, once the defense counsel fulfills her role of exploring the merits of the charge and its defenses. Such a common understanding no doubt forms part of the underpinnings of the everyday workings of the present criminal justice system. In a setting in which the defense counsel (legal aid, appointed counsel, counsel from law school clinics), the prosecutor, and the judge are all "regulars," in that they work together daily in the same courtroom, they develop shared goals, attitudes, and rules of conduct that allow the system to work and the participants to work together. While this "shared" approach raises some troubling questions concerning the role of counsel and judge, it does not itself raise unique problems for the problem-solving courts.⁵⁰ From this perspective, it is easy to understand Judge Kluger's conclusion in *What is a Traditional Judge Anyway? Problem Solving in the State Courts*, that "if we are going to have to apply that kind of pressure, isn't it better that the pressure is in a life-changing direction . . . ?"⁵¹ Judge Kluger's comment invites exploration of the role of the drug court judge. That role is to accept a plea, impose a sanction, and then monitor the sanction.⁵² Does a judge's perception that the treatment alternative may be "life-changing" undermine the judicial obligation to assure that a plea "represents a voluntary and intelligent choice among the alternative courses of action open to

professionally competent assistance. *Id.* In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. *Id.* At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id.* at 690. Second, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution. *Id.* at 692.

50. For an early study of the bureaucratic allegiances of defense counsel, see Abraham S. Blumberg, *The Practice of Law as a Confidence Game: Organizational Cooptation of a Profession*, 1 LAW & SOC'Y REV. 15 (1967).

51. *Problem Solving in the State Courts*, *supra* note 1, at 210.

52. See DRUG COURT, *supra* note 11, at 4.

the defendant?"⁵³ To determine the voluntary and intelligent choice, states require that a plea can only be accepted "after the trial court fully and fairly apprised [the defendant] of its consequences and ascertained by appropriate questioning that he had in fact committed the crimes to which he was pleading and that the plea was freely and voluntarily made."⁵⁴

Can Judge Smith assure that this standard is fulfilled? He has led the effort to create the hypothetical Stanford Drug Treatment Court, for which:

The goal . . . would be not only to adjudicate the facts of the case, but also to address the problem that brought the defendant to court in the first place: namely, addiction. The idea was straight-forward—the court should actively try to solve the underlying problem of addiction. . . . It would use its coercive power to achieve the concrete goal of moving defendants from addiction to sobriety.⁵⁵

Does this commitment to treatment for addiction result in deafness to the possibility that the addicted defendant did not commit the charged crime? The answer must be that it is possible in a given case that the court might rush to treatment, but that the commitment to a treatment alternative for addicted defendants does not disqualify judges from accepting pleas in drug courts.

C. The Judge as Monitor: Ex Parte Communications

The acceptance of the plea and imposition of the sentence does not end the court's role in the defendant's life. Central to the alternative drug treatment model is the role of the judge in monitoring the progress of each defendant through "extensive communication between the court and the community-based programs; the court informs the treatment programs of each defendant's compliance conditions, and the programs keep the court informed as to defendants' progress."⁵⁶

Illustrations Two and Three provide examples of extensive court involvement. In Illustration Two, the defendant, Laura McManna, is before Judge Smith on an update appearance.⁵⁷ She has been clean for three months after an early relapse resulted in the court-

53. *North Carolina v. Alford*, 400 U.S. 25, 31 (1970).

54. *People v. Burgos*, 451 N.Y.S.2d 888, 890-91 (App. Div. 1982).

55. See *DRUG COURT*, *supra* note 11, at 2.

56. *Id.* at 4.

57. *Id.* at 6.

room observation sanction.⁵⁸ Attorney Simkins announces that McManna is in the process of preparing for her GED exam.⁵⁹ Judge Smith then proceeds to present McManna with a reward, a leather-bound journal for keeping track of her progress.⁶⁰

Simkins next steps forward to request that McManna be permitted to complete her treatment at an out-patient program.⁶¹ Judge Smith is hesitant to grant the relief and informs Simkins that he will discuss the matter with the court's clinical director during the lunch break.

Closing down the court for lunch recess, Judge Smith stops by the office of the drug court's clinical director. . . . Mr. Brown supervises the court's social workers, and he is recognized to be the court's authority on the various community-based treatment programs used by the court. In speaking to Mr. Brown, Judge Smith learns that 90% of those defendants who are able to successfully complete the first phase of the court's treatment component—remaining clean for four months—have either successfully graduated from the program or are still active in treatment after two years. . . . With regard to Ms. McManna, Mr. Brown believes it would be best for her to remain in the in-patient program, at least until she makes it past the four month threshold.⁶²

Following lunch, Judge Smith announces "Ms. McManna, I have given your request a good deal of thought and have spoken with our clinical director, who is an expert on drug addiction. At this time I think you should continue at Pine Hills [the in-patient center]." ⁶³

Illustration Three provides a somewhat different scenario. In this case, Frank Granada is alleged to have absconded from his in-patient treatment program, been found sleeping on a bus, and has tested positive for cocaine.⁶⁴ This is Mr. Granada's second absence from the program, and according to his agreement, he will receive a sanction of between fifteen and twenty-eight days in jail.⁶⁵ A third absence would result in his termination from the program.⁶⁶ When given a chance to speak, Granada tells the courts "I left New

58. *Id.* at 6-7.

59. *Id.* at 7.

60. *Id.*

61. *Id.*

62. *Id.* at 7-8.

63. *Id.* at 8.

64. *Id.*

65. *Id.*

66. *Id.*

Horizons but I was going to go back. I only left to visit my aunt. She's real sick. And, I didn't use cocaine. . . . I took one of my aunt's painkillers for this back injury I have. . . . I swear it."⁶⁷ To which the Judge Smith replies: "I simply don't believe you"⁶⁸ and sentences him to fifteen days. During this proceeding Mr. Simkins attempts to speak on behalf of Mr. Granada but is cut off by Judge Smith.⁶⁹ "Counsel, I am talking to Mr. Granada. I want to hear what he has to say for himself."⁷⁰

Two possible problems arise from these exchanges. The first is the communication between Judge Smith and Brown. They speak both generally about drug rehabilitation, and specifically about McManna's case.⁷¹ On the basis of this conversation, Judge Smith rejects McManna's request.⁷² Does this ex parte exchange between Judge Smith and Brown regarding McManna's case violate any due process tenet? The answer is no for two reasons. First, in order for McManna to even complain of the communication, she must have a constitutionally protected interest that might be restricted by the exchange. Does McManna have a constitutional right to out-patient treatment when her sentence was in-patient treatment? *Greenholtz v. Inmates of Nebraska Penal & Correctional Complex*⁷³ would seem to answer this question in the negative, at least under the Constitution. In *Greenholtz*, the Court made clear that a convicted party had no constitutional right to release before the expiration of a valid sentence.⁷⁴ State courts have announced similar rulings.⁷⁵

Even if a constitutional right existed, it is doubtful that the ex parte communication between Judge Smith and Mr. Brown, at the post-disposition time, would violate due process. Under the doctrine announced in *Williams v. New York*,⁷⁶ a sentencing court is entitled to a broad range of information that would be:

67. *Id.* at 9.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. 442 U.S. 1 (1979).

74. *Id.* at 16.

75. See, e.g., *United States v. Edwards*, 430 A.2d 1321, 1340 n.44 (D.C. 1981) (stating that "unquestionably, there is no right to post-conviction bail."); *Gilmore v. Kansas Parole Bd.*, 756 P.2d 410, 415 (Kan. 1988) (holding that the state's parole statute did not create a liberty interest in parole).

76. *Williams v. New York*, 337 U.S. 241, 250 (1949).

[U]navailable if information was restricted to that given in an open court by witnesses subject to cross-examination. . . . The type and extent of this information make totally impractical if not impossible, such open court testimony with cross-examination. Such a procedure could endlessly delay criminal administration in a retrial of collateral issues.⁷⁷

Again, state courts have adopted similar reasoning.⁷⁸ While McManna, of course, is not actually being sentenced in this instance, effectively her request for a reduced sentence is part of the ongoing sentencing process and governed by the same rules.

Illustration Three, on the other hand, may present a different and more problematic situation. Assuming that the incarceration is a loss of liberty, the court is obliged to balance the individual interest, the state's interest, and the value of any advocated procedures for avoiding an erroneous deprivation.⁷⁹ On that basis, should Granada be able to contradict the positive cocaine test and establish the truth of the excuse for his absence? For example, should he be able to call witnesses? If the question is whether Granada was absent from the treatment center for whatever reason, and whether such an absence can trigger an incarceration under the terms of the sentencing agreement, then no serious due process question arises, unless Granada were to contest his absence. If, on the other hand, the incarceration is dependent upon determining the truth of Granada's excuses, the process due will depend mostly on how severe a loss of freedom the incarceration is judged to be. If the loss is analogized to a prison discipline restriction, such as solitary confinement or the loss of good time, less than full adversarial rights are required. The Supreme Court has found that due process is satisfied when the prisoner is afforded the following: adequate notice of the claimed violation; the written statements of evidence that are relied on; and an opportunity to call witnesses and present evidence in defense, as long as such efforts would not unduly jeopardize prison safety.⁸⁰ If, on the other hand, the loss is analogized to parole and probation violations, more procedural rights attach. For example, the Supreme Court has held that, in such cases, procedural protection includes the opportunity "to be heard in person and to present witnesses and documentary evi-

77. *Id.* at 250.

78. *See, e.g.*, *People v. Peace*, 219 N.E.2d 419, 421 (N.Y. 1966); *Buchea v. Sullivan*, 497 P.2d 1169, 1174 (Or. 1972).

79. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

80. *See Wolff v. McDonnell*, 418 U.S. 539, 571 (1974).

dence [and] the right to confront and cross-examine adverse witnesses.”⁸¹ There would also likely be the right to counsel, although the Supreme Court has determined that the need should be assessed on a case-by-case basis.⁸² Here, even if your view of Granada’s liberty interest is that it is tantamount to that of a prisoner subject to discipline, Judge Smith acted too summarily in response to Granada’s defense. Assuming again that the defense could have an impact on the fact or time of incarceration, Mr. Granada should have had the opportunity to offer proof that, for example, the drug he had taken was a pain killer.

IV. THE COMMUNITY COURT

A. Description

The Brownsberg Community Court was established to address low-level criminal activity, such as “prostitution, drug dealing, public drinking and vandalism” that was beginning to overrun the downtown section of the community.⁸³ In effect, the central court system had basically ignored these crimes, sentencing almost all of those who pled guilty (seventy-five percent at arraignment) to time served, the time locked up waiting for arraignment.⁸⁴ There was no real distinction between those found guilty and those whose cases were dismissed. This led to a downward spiral in police attention to such cases.⁸⁵ Why should they bother if the courts were simply going to release offenders without punishment? Additionally, such a system did nothing to address the problems underlying the commission of such crimes.⁸⁶

The community court is actually a misdemeanor arraignment facility where police bring defendants charged with the above-described crimes instead of the normal centralized arraignment court.⁸⁷ At the court, an attempt is made to create a profile of the defendant, including information on the defendant’s employment status, criminal record, drug use, health, and housing situation.⁸⁸ This information is added to the court’s computer database, which

81. *Morrissey*, 408 U.S. at 489.

82. See *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973).

83. See CTR. FOR COURT INNOVATION, CASE STUDY: BROWNSBERG COMMUNITY COURT 1 (1999) [hereinafter *COMMUNITY COURT*]. The Case Study is reprinted in Appendix 2 with permission from the Center for Court Innovation.

84. *Id.* at 2.

85. *Id.*

86. *Id.*

87. *Id.* at 4.

88. *Id.*

allows the judge to have a readily available profile of the defendant at the time of arraignment.⁸⁹ Based on the alleged crime and the background material, a plea offer is extended to the defendant at arraignment.⁹⁰ If the plea is rejected, defendants are returned to the central court for further proceedings.⁹¹ If the plea is accepted, the sentence is immediately imposed.⁹² The sentence is almost never time served.⁹³ "Almost all defendants are required to perform community service in order to pay back the neighborhood they have harmed. These projects, supervised by a community service coordinator employed by the court, include graffiti removal, improvement of park gardens, or office assistance for local non-profit organizations."⁹⁴ As part of their sentences, many defendants must also participate in treatment programs (for example, drug treatment), which are offered at the court facility. These programs remain available on a voluntary basis after the sentence has been served.

The court maintains a continuous dialogue with the public defenders, prosecutors, social service staff, and the community over new sentencing options and the effectiveness of the existing sentences.⁹⁵ Additionally "every month Judge Green convenes a panel of community members and police officers to hear about concerns and changes in the community."⁹⁶

B. The Community Advisory Board

Illustrations One and Two highlight the unique role the community court judge plays in formally soliciting and considering community viewpoints. These illustrations also establish a context in which to evaluate the proceedings that occur in Illustrations Three and Four. In Illustration One, Judge Green is in her chambers meeting with her community advisory board, a group of people representing various segments of the neighborhood.⁹⁷ Also present are law enforcement representatives and court personnel.⁹⁸

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 5.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

The head of a block association informs the court of growing concern about prostitution, which is disrupting the neighborhood.⁹⁹

The corner of Park and Main has been awful lately—nothing but prostitutes, ‘johns,’ and noise. The same cars—filled with guys looking to buy sex—drive around and around all night long. They shout and honk their car horns until the early hours of the morning. I can’t get any sleep. Everyone in our building is sick and tired of it.¹⁰⁰

At one point in the conversation, a local parent suggests that the sentence for “johns” should be a car honking in their neighborhood until the early morning.¹⁰¹ This comment fosters in Judge Green the thought of confronting defendant “johns” with the community impact of their crimes, which will be discussed below.¹⁰² Concurrently, law enforcement representatives inform the group that they have received a number of similar complaints, and are planning an undercover sweep on that particular corner.¹⁰³ As the meeting ends, a number of business owners inform the judge that their stores have been the target of a graffiti spree.¹⁰⁴ Judge Green tells them that she will consider using a community service team to remove the spray paint.¹⁰⁵ To the business owners this response seems eminently sensible.¹⁰⁶ “That would be terrific. Let the group who made the mess clean it up for a change.”¹⁰⁷

Illustration Two opens a window on a meeting of Judge Green and her community court staff, which include the court’s mediation expert, its community service coordinator, and the court’s clinical psychologist.¹⁰⁸ They are discussing the community meeting which all attended.¹⁰⁹ The community service coordinator agrees to send a clean up crew to the graffiti-hit business area.¹¹⁰ They then turn to a conversation about the prostitution problem.¹¹¹ The psychologist reports on research supporting facilitated meetings between of-

99. *Id.*

100. *Id.*

101. *Id.* at 6.

102. *See infra* Part IV.C.

103. COMMUNITY COURT, *supra* note 83, at 6.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 7.

109. *Id.*

110. *Id.*

111. *Id.*

fenders and victims.¹¹² “[I]t helps offenders to realize that their acts have harmed the community, and it allows the community to play a role in the criminal justice process.”¹¹³ The import of this observation later impacts the sentence Judge Green imposes on a “john.”¹¹⁴

Both of these illustrations present a picture of a proactive judge, set to use her coercive powers to remedy immediate “community” problems learned about through her community communications system.

Such judicial proactivity has raised questions of judicial impartiality. At the first of the Justice Department discussions, Judge Lederman described criticism she apparently experienced as a problem-solving judge:

You need a lot more courage as well, because you will be subject to tremendous criticism from your colleagues. “Are you being impartial? Do you know too much so that you can no longer be impartial?” I can’t tell you how many times I have heard that. Which leads me to one of my favorite quotes, which is “The judiciary is the only profession that exalts ignorance.”¹¹⁵

Too much knowledge, itself, is probably not the basis of the criticism noted by Judge Lederman. No one really expects or wants a lawyer, upon becoming a judge, to self-exile herself to a judicial monastery. Even describing the concern as over-impartiality, at least in the most narrow due process sense, seems too narrow. There the question would be whether the presiding judge can impartially review the defendant’s guilty plea or whether she can preside impartially over any post-conviction “monitoring” hearings. In other words, the judge does not participate in the processes through which a defendant’s guilt is determined.

What is unsettling about these Illustrations, specifically Illustration One, is the film of Judge Green presiding over an apparently formal and regular meeting of both law enforcement officials and community representatives, assembled to discuss “community” problems and community-suggested remedies. The broad question raised by this scene is whether the community court has moved from a more central posting on the balance between political institutions (the legislature, the executive) and the individual toward a

112. *Id.*

113. *Id.*

114. *Id.*

115. *Problem Solving in the State Courts*, *supra* note 1, at 80.

more political role as policy formulator and enforcer.¹¹⁶ If so, the move raises a challenge to the traditional notion of the court as an independent institution, having “neither force or will, but merely judgment.”¹¹⁷

Looking more specifically at the described meeting, the presence of law enforcement officials reporting to Judge Green on the types of complaints they have been receiving casts Judge Green almost as a magistrate in the European inquisitorial model, ready to serve the state. Such a setting may violate Canon 4(C) of the 1990 American Bar Association Model Code of Judicial Conduct,¹¹⁸ which prohibits judges from consulting with an “executive . . . official except on matter’s concerning the law. . . .”¹¹⁹ Aside from the canon, the broad due process concerns are evident, given judicial responsibility for protecting the rights of defendants from the overreaching of law enforcement and in providing impartial judgments.

The presence of community representatives also could challenge Judge Green’s judicial independence, or the public sense of such independence, by creating an expectation in the community representatives that the judge would act on their suggestions. Even worse, such a meeting might engender a sense of obligation to act on these suggestions or worse, a commitment to a jointly established agenda. Even the appearance of such an obligation would run counter to Canon 1, which declares that “an independent and honorable judiciary is indispensable to justice in our society,”¹²⁰ as well as Canon 2(B), that prohibits judges from conveying or permitting others to convey “the impression that they are in a special position to influence the judge would be in conflict.”¹²¹

Placing this concern in a larger context, such formal meetings tend to impose legislative values upon the judicial function. For example, the community leaders who attend these meetings are no doubt influential in other aspects of community life, including the processes through which judges are either appointed or elected. It would be hyper-sanguine to think that disappointment over a

116. For a discussion of this point, see Carl Baar & Freda Solomon, *The Role of Courts: The Two Faces of Justice*, 15 CT. MANAGER 19, 19-27 (2000).

117. THE FEDERALIST No. 78 (Alexander Hamilton).

118. The 1990 American Bar Association Model Code of Judicial Conduct is the successor to 1972 ABA Code. The Code is not binding on judges unless adopted by their states. All but two states (Montana and Wisconsin), the District of Columbia, and the United States Judicial Conference have adopted codes modeled on either the 1990 or 1972 Model Code.

119. MODEL CODE OF JUD. CONDUCT 549 (1990).

120. *Id.* at 547.

121. *Id.*

judge's failure to act on a community leader's views expressed in a formal setting would not translate into the judicial selection process.

Does the above emphasis on judicial independence require judicial isolation from civic engagement? The answer to this question must be no. As one state's highest court has written, incorporating a commentary to the Model Code: "We agree emphatically that complete separation of a judge from extrajudicial activities is neither possible nor wise; he should not become isolated from the society in which he lives."¹²² Not only is it impossible to isolate the court from opinion-shaping influences, but also it would be dangerous to do so. The public's understanding of the role of the court system is extremely important to the system's ongoing legitimacy.¹²³ "In the absence of non-judicial activities that reflect the tenor of a judge's ideas, the public and the bar will have no way of knowing of the jurist's proclivities. A ban on non-judicial activities will not erase biases, it will simply hide them."¹²⁴ Judges also benefit from civic activity. Judging requires that judges "live, breathe, think and partake of opinions in that world."¹²⁵ But such activity cannot be limitless. The question is where to draw the line. The answer of necessity is general and somewhat circuitous. "This line should not be drawn to eliminate all perceivable evils and temptations. Rather, the delineation should give the members of the judiciary every reasonable degree of latitude, barring activities only where they do measurable damage to the court's . . . appearance of impartiality."¹²⁶ To which should be added "independence" or "appearance of independence." Of course, this exploration of judicial civic engagement does not directly provide an alternative to Judge Green's community advisory board, with its emphasis on very particular problems within the court's remedial power. And it is not certain that such an alternative is possible, as it seems that the goal of this advisory board is to provide a "community" bias in

122. *In re Bonin*, 378 N.E.2d 669, 683 (Mass. 1978) (quoting CODE OF JUDICIAL CONDUCT Canon 5(A) cmt. (1972)).

123. See Kevin M. Esterling, *Public Outreach: The Cornerstone of Judicial Independence*, 82 JUDICATURE 112, 112-13 (1998) (explaining how maintaining public confidence through community involvement is vital for allowing courts to act as independent decision-makers).

124. JEFFREY M. SHAMAN ET AL., JUDICIAL CONDUCT AND ETHICS 313-14 (3d ed. 2000).

125. Robert McKay, *The Judiciary and Nonjudicial Activities*, 35 LAW & CONTEMP. PROBS. 9, 12 (1970).

126. SHAMAN ET AL., *supra* note 124, at 315.

judicial decision-making. Otherwise what purpose does the board serve?

C. The Plea Offer, Counsel's Advice, the Plea's Acceptance

Illustrations Three and Four include pleas of guilt and the imposition of particular community court-type sentences.¹²⁷ Both include offenses discussed in the meeting described in the earlier illustrations. In Illustration Three, George Rojas is charged with defacing public property by spraying the phrase "Y2K" on the side of a delivery truck.¹²⁸ At arraignment, after spending a night in jail, the prosecutor offers the defendant a plea to disorderly conduct and a sanction of time served.¹²⁹ The court disagrees with the offered plea and a new plea is offered.¹³⁰

Judge Green: Do you want to take a moment to re-think your offer, counselor? I don't see how time served does anything to repay the community.

Assistant District Attorney Wright: Judge, on second thought, we'd like to offer a plea to disorderly conduct and recommend a sentence of eight hours of community service, which I think will send a strong message to Mr. Rojas about the impact of his behavior.¹³¹

The plea is then accepted by the defendant after Judge Green "engages the defendant in the required plea colloquy."¹³² Judge Green's interference with the offered plea unfavorably affects Rojas's liberty interest. But does it violate Rojas's due process rights? The answer is no. The prosecutor is not offering a plea to a lesser charge, but just offering a lesser sentence for the same charge that the court judges ought to be more severely sanctioned. Basically the judge's discretion in this instance is unchallengeable. Even if the question were one of offering a reduced sentence, the court is under no obligation to accept a plea offered or negotiated.¹³³

In Illustration Four, Judge Green is eager to impose a new sentencing option on "johns."¹³⁴ The sanction requires defendants to

127. COMMUNITY COURT, *supra* note 83, at 8-10.

128. *Id.* at 8.

129. *Id.*

130. *Id.*

131. *Id.* at 8.

132. *Id.*

133. See WAYNE R. LAFAYE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 21.3(e) (2d ed. 1992).

134. COMMUNITY COURT, *supra* note 83, at 9.

participate on a "community impact panel," which, in effect, is a facilitated meeting between three defendants and three community members at which "the community would let the offenders know how they have affected the community; the offenders would be permitted to respond, to apologize, and to offer the community suggestions for dealing with the problem of prostitution."¹³⁵ The sanction has been fashioned by the court's community mediation specialist.¹³⁶ The defense bar has expressed some concern about the new sanction, particularly because information disclosed at such meetings might be usable against the defendant.¹³⁷

Ronald Slip is the first defendant to be subject to the new sanction.¹³⁸ He has been arrested for soliciting sex for money from a police officer.¹³⁹ The prosecutor offers the new sanction as part of the plea.¹⁴⁰ Susan Jones, the defense counsel, is aware that Slip would not be sentenced to any jail time in the centralized court.¹⁴¹ She is also aware that requesting an adjournment to the centralized docket would require additional trips to court for Slip.¹⁴² In the end, after discussing the offered sanction with Slip, Jones announces that Slip is prepared to accept the offer.¹⁴³ The actual discussion between the two is not reported, but we can assume that it would not differ much from the conversation that took place in the drug court illustration.

But screening these cases through Judge Green's commitment to community input might result in a different outcome. Does the fact that the court is committed to community service in such instances make a difference? Judges have points of view on the value of various forms of sentencing and, as long as they are within the court's authority to impose, such views are not disqualifying. But, if the commitment to community service is a product of agreement with the community that, for example, everyone charged with disorderly conduct will receive community service, then the defendant has been denied due process because her case, in effect, is not being heard.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 10.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

V. THE DOMESTIC VIOLENCE COURT

A. Description

The West Jackson Domestic Violence Court was established to address a number of problems relating to the prosecution of domestic violence crimes.¹⁴⁴ Police officers did not take domestic violence with the necessary seriousness or were unaware of the grave dangers faced by complainants; abused women did not wish to press charges or testify; and defendants were often sentenced to probation without conditions, despite research that indicated that the risk of continued victimization was substantial.¹⁴⁵ At the time the West Jackson Court was established, attitudes about domestic violence had begun to shift, but the system remained unable to provide adequate resources to address the problems of how to protect the safety of domestic violence victims and to build a solid case against the defendant.¹⁴⁶ The goal of the court is “to ensure the safety and well-being of victims,” and to hold defendants accountable.¹⁴⁷ There are two prongs to this effort. The first is a concentrated effort to establish a “safety plan” for the victim and any children.¹⁴⁸ This is effected by the prosecutor’s office and victim advocates.¹⁴⁹ The second is to monitor the activities of non-incarcerated defendants.¹⁵⁰ The case begins in a normal arraignment part where bail or conditions of release are set.¹⁵¹ The case is then sent to the domestic violence court, which is basically a court part dedicated to addressing domestic violence cases.¹⁵² Judge Henderson presides in this court.¹⁵³ After a case has been put on his docket, he reviews the pre-trial status of each defendant.¹⁵⁴ He makes sure that every defendant is subject to a protective order.¹⁵⁵ And “[d]efendants who are not held pending trial are required to attend a batterers [sic] counseling program once a week as a means

144. CTR. FOR COURT INNOVATION, CASE STUDY: WEST JACKSON DOMESTIC VIOLENCE COURT 3 (1999) [hereinafter DOMESTIC VIOLENCE COURT]. The Case Study is reprinted in Appendix 3 with permission from the Center for Court Innovation.

145. *Id.* at 2.

146. *Id.*

147. *Id.* at 3.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at 4.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

of keeping tabs on them.”¹⁵⁶ Also, it is significant to note that case studies attribute no remedial value to the counseling program, describing it as “a means of keeping tabs on them.”¹⁵⁷

Key to the success of this court is its monitoring program. The center of this program is the resource coordinator, a court staff member who sits in the well of the court.¹⁵⁸ The coordinator’s job is to maintain a computer database on the status of both the defendant and the victim, and to report regularly to the judge.¹⁵⁹ Sources for this data are the batterer’s program, police, victim advocates, probation officers, and others.¹⁶⁰ The normal monitoring progress is a status hearing with the defendant every two or three weeks.¹⁶¹ Prior to the hearing, the judge reviews the case status with the coordinator.¹⁶² If an issue is raised, the judge confronts the defendant with the issue and gives him an opportunity to respond.¹⁶³ If the defendant is non-compliant, the judge may change his release condition or detain him.¹⁶⁴ If an emergency arises, for example, threatening the complainant, the coordinator is supposed to be notified and an immediate hearing is scheduled.¹⁶⁵

At some point, defendants will plead guilty or go to trial. No defendant who pleads guilty or is convicted is given straight probation.¹⁶⁶ At a minimum, defendants on probation must return to court every two months and visit regularly with their probation officers.¹⁶⁷

B. The Judge Speaks Out

Illustrations One and Two of the Domestic Violence Case Study focus on Judge Henderson outside of the courtroom.¹⁶⁸ In Illustration One, Judge Henderson has convened his monthly “domestic violence court partner session,” meetings “between all of the entities who work together on domestic violence cases.”¹⁶⁹ Included at

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* at 5.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* at 5-7.

169. *Id.* at 5.

this session are “a number of West Jackson police officials, probation officers, court clerks, intervention counselors for batterers, staff from the local domestic violence shelter, victim advocates, jail staff, and the domestic violence court’s resource coordinator.”¹⁷⁰ In Illustration Two, Judge Henderson is at the women’s centers at the state college, speaking on a panel on domestic violence.¹⁷¹ With him is an advocate for a victim’s group, the chief of police, and a local prosecutor. As part of his presentation, Judge Henderson observes:

In the past, our society viewed domestic violence as a private matter. . . . Problems between husbands and wives, boyfriends and girlfriends, and same-sex partners were considered outside of the law. Luckily, times have changed and courts all over the country have finally begun to work cooperatively with police, prosecutors, and battered women’s advocacy organizations to protect victims, ensure their safety, and hold abusers accountable for their actions.¹⁷²

And in retort to a question from a female student, who had felt fearful and angry after an earlier West Jackson domestic violence murder, he noted that “[the] domestic violence [court] was created to address her concerns.”¹⁷³

Illustration One raises the same concerns raised by Judge Green’s community advisory board. Illustration Two raises a more traditional judicial question regarding what limits, if any, ought be placed on public outreach. Applicable again is the discussion of Judge Green’s community advisory board. In short, “a judge ought to be able to express an opinion—pro or con—about controversial legal issues, as long as neither the words nor the context suggest an unwillingness to follow the law. . . .”¹⁷⁴ There is nothing in Judge Henderson’s statement that would seem to offend this standard, by aligning himself with a particular side on a political debate or prejudging a particular case.

C. The Batterer’s Program

Illustrations Three and Four return us to the court room. Illustration Four focuses on the extension of an order of protection and

170. *Id.*

171. *Id.*

172. *Id.* at 7.

173. *Id.*

174. SHAMAN ET AL., *supra* note 124, at 333; see *In re Sanders*, 955 P.2d 369, 374 (Wash. 1998).

the question of whether such an order should stop a couple from seeking counseling.¹⁷⁵ The problem is the absence of the complainant and no evidence that she wishes the order to allow such family counseling.¹⁷⁶ The events described signal no particular problem-solving court problem discussed elsewhere or any problem at all.¹⁷⁷ In Illustration Three, the defendant, Chin, is asking for a bail reduction.¹⁷⁸ Chin has been accused of assaulting his girlfriend, Wanda Smith.¹⁷⁹ The prosecutor is willing to agree to lower bail if the defendant agrees to a curfew and participation in a batterer's intervention program.¹⁸⁰ The defense counsel objected to this conditioned bail reduction, arguing that Chin has no record of domestic violence and that participation in the batterer's program and the curfew will harm his reputation and interfere with his work.¹⁸¹ The defense counsel also argued, "[I]f the allegations in this case involved strangers, you would not be ordering any kind of condition of release—let alone a batterer's program."¹⁸² Judge Henderson ignores this argument, as well as Chin's assertion of his innocence, and consequential protestation that the program would have no value for him.¹⁸³ In response to this latter point, Judge Henderson declared:

I'm not sending you to this program for your benefit—it's for the benefit of Ms. Smith and the people of West Jackson. . . . While you are awaiting trial, it is my job to make sure I know what you are doing, when, and how. As for your guilt or innocence, you'll have your day in court to present a defense, if you so choose.¹⁸⁴

Chin capitulates, is monitored for several months, including receiving calls at home from Judge Henderson, and is finally tried and acquitted.¹⁸⁵

The above exchange demonstrates a unique aspect of domestic violence courts. The "problem-solving" occurs prior to the disposition of the case, whether that disposition is through plea or trial.

175. DOMESTIC VIOLENCE COURT, *supra* note 144, at 9.

176. *Id.*

177. *Id.*

178. *Id.* at 7.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.* at 8.

183. *Id.*

184. *Id.*

185. *Id.*

This means that Chin is being sent to a batterer's program, and is subject to a curfew without admitting to, or being adjudicated, a batterer.¹⁸⁶ In this case, the defendant must choose between jail (in lieu of bail) or the proffered conditions. This seems a bit odd given Judge Henderson's concerns about the protection of the complainant and the weekly program attendance requirement.¹⁸⁷ Perhaps Judge Henderson was concerned that he could not maintain this high level of bail, or any bail, given Mr. Chin's profile, or that he might make the bail.¹⁸⁸ Apparently, though, such program attendance is a requirement for any alternative to pre-trial incarceration.¹⁸⁹ Judge Henderson will require a defendant, already out on his own recognizance, to attend the program as an added condition of that defendant's continued release.¹⁹⁰ According to the Domestic Violence Case Study, "defendants who are not held pending trial are required to attend a batterer's counseling program once a week as a means of keeping tabs on them."¹⁹¹ The fact that problem-solving in domestic violence courts precedes disposition should heighten judicial attention to the due process protections afforded defendants whose guilt has yet to be established.

Considering the due process concerns, what constitutional grounds support Judge Henderson's requirement of attendance in a batterer's program, a limitation on the defendant's physical and reputational liberty? The traditional basis for pre-trial detention, risk of flight,¹⁹² does not seem to be an issue in this case. Rather the argument is that attendance at the batterer's program is necessary to protect a witness, in this case, the abused complainant. Does such a purpose support commitment to a batterer's program? The United States Supreme Court has determined that the Due Process Clause supports additional pre-trial detention purposes, such as protecting a witness,¹⁹³ or obstructing justice. Similarly, in *Schall v. Martin*, the Supreme Court upheld a statute that permitted the pre-trial detention of a juvenile on any charge after a demonstration that the juvenile might commit some undefined future

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.* at 4.

190. *Id.*

191. *Id.*

192. See *Bell v. Wolfish*, 441 U.S. 520, 523 (1979); *Cooper v. Morin*, 399 N.E.2d 1188, 1195 (N.Y. 1979).

193. *United States v. Salerno*, 481 U.S. 739, 748-49 (1987) (upholding the Federal Bail Reform Act of 1984).

crime.¹⁹⁴ State courts, as a general matter, need not¹⁹⁵ and have not read their constitutions as broadly.¹⁹⁶ The New York Court of Appeals, for example, has pronounced that, under its due process clause,¹⁹⁷ "[t]he only legitimate purpose for pre-trial detention then is to assure the presence of the detainee for trial."¹⁹⁸ Nevertheless, New York's lower courts have allowed behavioral modification programs as a condition of bail.¹⁹⁹ In one such case, in fact, a trial court upheld attendance at batterer's program as a condition of release.²⁰⁰ The judge reasoned that:

Until there is a determination of guilt or innocence the court is responsible not only to seek justice by safeguarding the rights of the defendant; it must also insure that the complainant is secure and that societal peace is preserved during the pendency of the action. Directing a defendant to attend alternative to violence courses helps insure this.

Rather than implying guilt, attendance at the program, in tandem with its educational benefits, reminds the defendant, as does the order of protection, that although at liberty, he is still bound by the dictates of the court, which can rescind his liberty on his failure to abide by those dictates.

In requiring attendance at such programs, the court feels it is less likely that a temporary order of protection will be violated. Such a condition thus assists the court in its responsibility to secure the peace and protect the family.²⁰¹

This reasoning is too quick, at least as it relates to the Domestic Violence Court Case Study. It basically draws its analysis from the federal jurisprudence that holds that non-punitive, rational alternative bail purposes are constitutionally supportable, if not excessive in relationship to the alternative purpose.²⁰² Punishment is defined as a restriction on liberty that does not have another legitimate government purpose that such restriction rationally furthers.²⁰³ Attendance at a batterer's program has a branding effect on a de-

194. *Schall v. Martin*, 467 U.S. 253, 281 (1984).

195. *See People v. Keta*, 593 N.E.2d 1328, 1331 (N.Y. 1992) (finding greater protection for the defendant's right against search and seizure in the state constitution).

196. *See LaFave & Israel*, *supra* note 133, § 12.3(a).

197. N.Y. CONST. art. I, § 6.

198. *Cooper v. Morin*, 399 N.E.2d 1188, 1195 (N.Y. 1979).

199. *See, e.g., People v. Bongiovanni*, 701 N.Y.S.2d 613, 614 (Sup. Ct. 1999).

200. *Id.*; *see Halikopoulos v. Dillon*, 139 F. Supp. 2d 312, 318 (E.D.N.Y. 2001) (upholding a shoplift program as a condition of bail).

201. *Bongiovanni*, 701 N.Y.S.2d at 614.

202. *See United States v. Salerno*, 481 U.S. 739, 747 (1987); *Bell v. Wolfish*, 441 U.S. 520, 537-38 (1979).

203. *See Bell*, 441 U.S. at 539.

fendant's reputation, which is part of a person's liberty interest.²⁰⁴ It is hard to understand subjecting Chin to such a substantial diminishment of his liberty right for such limited state purpose. Unlike the court in *People v. Bongiovanni*,²⁰⁵ Judge Henderson provides a much more accurate description of the program's goal—to allow the court to keep tabs on Chin.²⁰⁶ But how weekly attendance at the program effects this goal is unclear. It also seems unnecessary, given the availability of the curfew and other alternatives, such as the order of protection and continuous reporting to a parole officer. Simply put, the program appears to be of no real value, consequentially, it seems punitive. Thus, Chin is being required to attend an almost valueless batterer's program because of a complaint, which he denies.

If attendance at a batterer's program is a punishment, it may also raise double jeopardy issues. Under Supreme Court doctrine, a defendant cannot be subject to multiple punishments for the same offense.²⁰⁷

Even if Judge Henderson has the authority to compel Chin's attendance at the batterer's program, the procedures used to arrive at this restriction do not satisfy procedural due process. Chin is still entitled to an individual determination that he presents a threat to the complainant.²⁰⁸ Such a determination does not constitutionally require a mini-trial with attendant procedural rights, particularly given the relative minimum restriction of weekly attendance at the program.²⁰⁹ But it does require that the state assert reasons or evidence why the defendant ought to be retained or subject such a level of bail.²¹⁰ It does require that the defendant be offered an opportunity to assert the reasons why he ought not be subject to the conditions requested by the state.²¹¹ From these arguments, the court must make a judgment on whether to limit or condition the defendant's fundamental right to liberty.²¹²

According, to the New York State Court of Appeals:

204. See *Quinn v. Shirey*, 293 F.3d 315, 319 (6th Cir. 2002) (citing *Chilingirian v. Boris*, 882 F.2d 200, 205 (6th Cir. 1989)).

205. *Bongiovanni*, 701 N.Y.S.2d at 614.

206. See DOMESTIC VIOLENCE COURT, *supra* note 144, at 8.

207. See *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).

208. The rationale for using weekly attendance at the batterer's program for this purpose is elusive, given the court's skepticism over its tempering value.

209. See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

210. See *People ex rel. Lobell v. McDonnell*, 71 N.E.2d 423, 425 (N.Y. 1947).

211. See *id.*

212. See *id.*

The bailing court has a large discretion, but it is a judicial, not a pure or unfettered discretion. The case calls for a fact determination, not a mere fiat. The factual matters to be taken into account include:

“The nature of the offense, the penalty, which may be imposed, the probability of the willing appearance of the defendant or his flight to avoid punishment, the pecuniary and social condition of defendant and his general reputation and character, and the apparent nature and strength of the proof as bearing on the probability of his conviction. . .”²¹³

At a minimum, taking into account factual matters, requires an impartial judge, at least one willing to assess and weigh the arguments for and against restrictions on Chin’s liberty. Is Judge Henderson constitutionally impartial? Both his public speech and expressed anger toward Chin would suggest a negative answer. The charge itself appears to be determinative for Judge Henderson, leading to the conclusion that such a charge in this court carries with it an irrebuttable presumption that the defendant is too dangerous to be released without conditions. This is not to argue that Judge Henderson, like Judge Smith of the drug court, cannot have a point of view on the treatment of certain categories of defendants; but only to argue that advocacy cannot be or appear to be determinative without regard to the case’s particular facts.

These criticized practices of Judge Henderson do not seem central to the due process success of the domestic violence courts. Neither refusing invitations to anti-domestic violence “rallies,” nor restraining one’s comments concerning the perceived virtues of domestic violence courts would appear to end their effectiveness. Affording the defendant a reasonable opportunity to present his arguments for relief would not appear to end their effectiveness either.

CONCLUSION

The above analysis of problem-solving courts is based on case studies intended to portray “typical” problem-solving courts. The comparative aspects of this analysis are with the McJustice courts and not an idealized version of the court system. The goal of problem-solving courts are to restore a sense of order and justice to a judicial system that to many seems chaotic and broken. Whether these courts are successful awaits future judgment. Addressing

213. *See id.* (quoting *People ex rel. Rothensies v. Searles*, 243 N.Y.S. 15, 17 (App. Div. 1930)).

some due process concerns now will improve their chances for success. These concerns resolve around judicial activism, which, in the case of community courts, undermines judicial independence and, in the case of domestic violence courts, punishes prior to conviction.

APPENDIX 1***CASE STUDY: STANFORD DRUG
TREATMENT COURT²¹⁴****CONTEXT**

Recent years have witnessed an explosion of drug-related crime. The evidence can be seen on the nightly news and felt in our courtrooms. According to the Federal Bureau of Investigation, almost 1.6 million state and local arrests were made for drug law violations in 1997.²¹⁵ During that same year, in both Chicago and New York City, approximately 80% of adult males tested positive for illicit drug use at the time of their arrest.²¹⁶ Drug crime recidivism is a large part of this story: the Justice Department estimates that more than half of defendants convicted of drug possession are likely to recidivate with a similar offense within two to three years.²¹⁷

BACKGROUND

Frank Smith is a judge in the Stanford criminal court system. Over the years, he has been assigned to arraignments, a misdemeanor calendar, and a general felony docket. By 1997, his 12th year on the bench, Judge Frank Smith had handled hundreds of cases—conducting hearings, ruling on motions and presiding over trials. Many of the cases presented a different version of the same tale: indigent defendants arrested for non-violent, drug related

* EDITOR'S NOTE: This Case Study has been reprinted with permission from the Center for Court Innovation. The Case Study has undergone only minimal editing.

214. This case study is one of a set of case studies written by the Center for Court Innovation in 1999 as part of the briefing materials for a series of roundtables that brought together leading academics and practitioners to explore some of the ethical and legal challenges presented by problem-solving courts. These case studies were not intended to describe best—or even appropriate—practice in problem-solving courts. Instead, they were deliberately written to highlight possible tensions between problem-solving courts and traditional practice in the courts and to provoke conversation among roundtable participants. The case studies were written by a team that included: Greg Berman, John Feinblatt, Scott Schell, and Mae Quinn. The Center for Court Innovation would like to offer thanks to the following people who commented on earlier drafts of the case studies: Cait Clarke, Susan Knipps, Eric Lane, Roy Simon, and Michael Smith.

215. OFFICE OF NAT'L DRUG CONTROL POL'Y, DRUG POL'Y INFO. CLEARINGHOUSE, DRUG DATA SUMMARY 2 (April 1999).

216. NAT'L INST. OF JUSTICE, ADAM 1997 ANNUAL REPORT ON ADULT AND JUVENILE ARRESTEES (NCJ-171672).

217. OFFICE OF JUSTICE PROGRAMS DRUG COURT CLEARINGHOUSE & TECHNICAL ASSISTANCE PROJECT AT AMERICAN UNIV., LOOKING AT A DECADE OF DRUG COURTS 6 (June 1999).

crimes. And, in all too many cases it seemed the defendants were drug addicts.

Unfortunately, the only sentencing options that were readily available to Judge Smith were incarceration or probation. Given limitations on resources and the number of addicted offenders serving time, it was almost certain that a defendant sentenced to incarceration would receive little in the way of drug treatment. Similarly, overworked probation officers often did not have the time, resources, or energy to find appropriate treatment programs, let alone diligently monitor defendants who were ordered to obtain treatment as a condition of probation. As a result, almost all addicted defendants passed through the system without meaningful intervention to curb their addiction.

And, in the end, whether Judge Smith sentenced an individual defendant to incarceration or probation, it was rarely the last time the defendant would see a courtroom. Some time later—five years? three years? six months?—the defendant would wind up back in the system again, re-arrested for another offense. Then the whole process would begin all over, sometimes in front of Judge Smith and sometimes in front of another judge, with higher stakes for the defendant who was by this time a predicate felon. In essence, feeling like his work wasn't making much of a difference, that he had become part of what critics were calling the "revolving door" of justice, Judge Smith grew more and more frustrated. This frustration drove Judge Smith to consider the broader implications of his own efforts. If addiction was driving the majority of his caseload, shouldn't the court be doing something about it?

PLANNING

Finally, in 1997, Judge Smith decided to lead an effort to establish a drug treatment court modeled after the country's first drug court launched in Dade County, Florida in 1989. Judge Smith proposed to court administrators that all non-violent felony drug cases in the region be routed to a single, specialized courtroom, over which he would preside. The goal of the court would be not only to adjudicate the facts of the case, but also to address the problem that brought the defendant to court in the first place: namely, addiction. The idea was straight-forward—the court should actively try to solve the underlying problem of addiction in addition to processing the case. It would use its coercive power to achieve the concrete goal of moving defendants from addiction to sobriety.

After numerous meetings, Judge Smith won the support of court administrators, elected officials, and community advocates. Others were more skeptical. For instance, the local defense bar was concerned about diverting judicial attention and energy away from determining whether defendants were guilty or not guilty. And, since much of the information disclosed by individuals in treatment is usually treated as confidential, the thought of having a judge become actively involved in defendants' progress in treatment raised eyebrows. Moreover, defense attorneys were nervous about the potential for judicial prejudgment of their clients, as well as the danger of widening the net of government control over them.

Police were also worried about the implications of the new court. They wanted to know what impact it would have on their work. Would the court be soft on crime? Would their drug enforcement efforts be a waste of time since defendants would be going to treatment and having their cases dismissed?

Despite these initial questions and concerns, over time, local prosecutors, defense attorneys, police, probation officers and drug treatment providers all came to the table, willing to test a new approach to what everyone agreed was a problem that had resisted conventional solutions. Together, they worked with Judge Smith to create a pilot program, using funds provided by the federal government.

The program was based upon the notion that a court could use its coercive power to engage defendants in drug treatment. By establishing a framework for handling cases and making treatment available, and by gaining the support of prosecutors and defense counsel for this structure, the drug court sought to substantially eliminate case-by-case judgments regarding sanctions and rewards. Defendants receiving help for their drug problems would become the norm, rather than an exception. Moreover, each defendant would have a good understanding of what the deal was before agreeing to participate.

DRUG TREATMENT COURT MODEL

The Stanford drug court, like most others, uses a "teamwork" approach. The team—consisting of Judge Smith, the prosecutor, defense counsel, court social workers, and offsite treatment providers—works together each day towards the goal of helping addicted defendants achieve and maintain sobriety.

Under the scheme adopted during the planning process, the district attorney determines which cases coming into the system

should be routed to the drug treatment court. To accomplish this task, intake prosecutors review all new felony drug cases to see if they have features that would make them ineligible for the drug court. As indicated in written eligibility guidelines, cases involving alleged high-level drug dealers, drug ring organizers, or dealing near schools, are usually left to be handled by regular criminal court judges. While defense counsel has no formal role in deciding which cases are selected, some defense lawyers have contacted the screening prosecutor to argue for diversion. Sometimes these efforts prove successful. Sometimes not.

Cases routed to the drug court are prosecuted by a designated drug court assistant district attorney, Paula Phillips. Ms. Phillips has served as a Stanford prosecutor for ten years. She has worked on hundreds of drug cases, and was selected for the job based upon her experience and interest in the project.

Similarly, most cases calendared in the drug court are assigned to a single public defender, James Simkins. Mr. Simkins was originally opposed to working as a “team” member in a drug court. At first blush the thought of regular collaboration between the prosecutor and defense counsel seemed antithetical to the notion of zealous advocacy. And he recalled being taught that a defense attorney should be concerned about a client’s expressed interest, not necessarily his best interest—even though he now understands that the choices for a practicing defense lawyer are seldom so black and white. After reflecting on the complexities of representing defendants and receiving some encouragement from Judge Smith—a judge before whom he had appeared on many occasions—Mr. Simkins decided to accept the assignment.

At the outset, Mr. Simkins did not wholeheartedly “sign on” to all components of the program. Nevertheless, he approached the position with an open mind. After all, he saw first-hand the devastating impact of addiction on his clients’ lives. And he knew from experience that those defendants who did not receive treatment were likely to recidivate. He felt certain that this new program would complicate the decisions faced by his clients, but he also was intrigued by the possibility that his clients would receive meaningful help for the problems that brought them into the system.

Once they are routed to the drug court, defendants meet with a drug court social worker for a full addiction assessment to screen out those cases where defendants do not need drug treatment. The drug court hired its own social workers for this job, rather than asking the local probation department or pretrial services agency

to fulfill this role. These hires were possible because of funds provided by the federal government. However, it is the hope of the court that the state legislature will provide funding for the salaries of the social workers in future court administration budgets.

Because of the confidentiality concerns flagged by defense counsel during planning, defendants are asked to sign waivers allowing for a limited disclosure of information learned during the initial assessment. In most cases, the defendant signs the waiver after receiving an explanation from the social worker assigned to the case, but without the advice of a lawyer. The initial assessment allows social workers to form treatment recommendations based upon information such as the defendant's criminal record, his present charges, the severity of his addiction, his community ties, and his employment and housing status. This information also is available for the court to consider.

Defendants who plead guilty to charges against them in the drug court, usually a reduced felony count, are ordered into a recommended drug treatment program by Judge Smith. If they successfully complete treatment, the plea is vacated and the charge is dismissed, leaving them without a conviction—a substantial incentive for participation.

The treatment programs used by the court are community-based programs run by private, non-profit agencies that were solicited by court administration staff. Both in-patient and out-patient in nature, these programs last anywhere from a few months to two years in duration. There is a close working relationship and extensive communication between the court and the community-based programs; the court informs the treatment programs of each defendant's compliance conditions, and the programs keep the court informed as to defendants' progress. The programs promise to make treatment slots available to the court, in exchange for the court's commitment to make use of them.

Judge Smith—using a carrot and stick approach—plays a significant role in moving defendants from addiction to sobriety. Judge Smith follows the progress of each defendant in treatment through updates frequently provided by the community-based programs. Successful defendants are rewarded with applause, reductions in the frequency of court appearances, and writing journals. Relapsing or non-compliant defendants are quickly confronted and must pay the consequences of graduated sanctions. Sanctions run the gamut from writing essays to sitting in the courtroom all day to spending a week in jail. The sanctions for non-compliance are

spelled out for defendants in treatment agreements they sign at the time they enter their guilty plea. The drug court takes into account the realities for addicts trying to kick their substance abuse habit, allowing them a number of opportunities to return to treatment after relapsing. However, if over time a defendant fails to successfully complete a court ordered drug treatment program or is re-arrested, the case will proceed to sentencing before Judge Smith.

ILLUSTRATION ONE

At 8:45 in the morning, attorney James Simkins meets with defendant Charles Rogers in a court holding cell to discuss Mr. Rogers's upcoming hearing before Judge Smith. At the last hearing, two days before, the government offered to allow Mr. Rogers to plead guilty to a lesser felony count of possession with intent to distribute cocaine versus distribution of cocaine for which he was originally charged. If Mr. Rogers pleads guilty, he would be ordered into an 18-month in-patient drug treatment program and if he successfully completed treatment, the charges against him would be dismissed. If he fails to complete the program, he would serve 36 months' incarceration. "Mr. Rogers," Mr. Simkins begins, "I know we have discussed your case a number of times, but I just want to be sure you understand your options. The prosecution has offered to let you plead to a lesser offense as part of the treatment diversion offer. If you reject this offer you are facing up to 25 years if convicted of the top charge."

Defendant Rogers tells Mr. Simkins he understands that part, but doesn't understand the treatment component and why the court would be interested in dismissing the charges against him.

"Well," Mr. Simkins explains, "this is a drug treatment court. In these courts, the goal is making sure you get help for your addiction. So, after you plead guilty, instead of serving a regular sentence, the court would order you into the drug treatment program recommended by the social worker you met with a few days ago. In your case, the social worker has recommended that you be placed in an 18 month in-patient drug treatment program."

"How did she come up with that?" Mr. Rogers asks.

Mr. Simkins continues, "The social workers are specially trained in addiction cases. Your social worker considered all the information you gave her—about your history of drug usage, your drug of choice, the amount of drugs you use on a regular basis, your criminal history, your housing needs, and other things. She made her decision based on her experience and with the help of the court's

computer program—which calculates all the information she inputs and spits out an analysis of your level of addiction. The recommendation is pretty standard for people with your history of drug use and the charge you’re facing.”

“Look, I know they found twelve rocks in my shoe when they searched me. But I thought you said you could try to get the case thrown out.” Mr. Rogers tells Mr. Simkins.

“Well, nothing is certain, but you do have a pretty good Fourth Amendment issue. If the judge agrees that the police didn’t have the right to stop you, the drug evidence against you would be suppressed. But,” Mr. Simkins warns Mr. Rogers, “you would be taking a real risk by going forward on a motion to suppress. If the judge didn’t throw out the evidence, you’d be back where you are now, except the amount of time you’d be facing would probably be more.”

“What do you mean? Why more time?” Mr. Rogers asks.

“Right now, even though under the statute you can get up to ten years in jail for possession with intent to distribute cocaine, the government has agreed that your “back up” time would only be 36 months’ incarceration. So, if you failed out of treatment, or took off, or got rearrested—the worst you would get on this case would be 36 months. That’s if you take the deal today. If you don’t take the deal today and we lose on the motion, the government will probably ask for more backup time. That’s the way it works. Let me be clear: you can always ask for treatment in this court, but the longer you wait, the more time you would likely face if you don’t follow through with your program. Does all of that make sense?”

Upset, Mr. Rogers asks: “Can they do that? Try and force me to get treatment?”

Mr. Simkins explains that they don’t have to offer him any deal at all, and reminds him that he is presently facing up to 20 years since he is charged with distribution.

“Well, what do you think I should do?” Mr. Rogers asks, “You’re my lawyer.”

“The ultimate decision has to be yours Mr. Rogers,” Mr. Simkins begins. “I think you have a really good suppression issue—not a slam-dunk, but good. Aside from the legal questions, though, you should ask yourself what you think is best for you. Even if we got this charge dismissed, where would you be? You told me you thought you needed to clean up. Here you have been given the chance to get off the street for a while. I’m not saying it would be easy—you’d have to come back to court every two weeks, do drug

tests all the time, and lose your freedom for a while. It's a good deal, though, if you can make it through."

Mr. Rogers asks Mr. Simkins: "So, if I test dirty, then I've gotta do the time?"

"No, you won't fail out with a few dirties; but you will face sanctions. You'll have to sign an agreement when you enter the plea saying you agree to the sanctions in advance—so you'll know what they are. For instance, after a certain number of dirty urine tests you would spend a weekend in jail. Too many mistakes, though, could result in you having to do your agreed upon sentence."

"Man, I don't know what to do," Mr. Rogers says. "A year and a half in a program is a long time, especially if I still might wind up doing time anyway. But, I do want to start cleaning up. Things have gotten pretty messed up for me lately."

"Well, think about it. Your case won't be called for about another fifteen minutes or so. I'll come back right before the Judge takes up your case to find out what you decide."

Judge Smith calls the case of *State v. Charles Rogers* at 9:15 a.m., at which time the defendant enters a guilty plea and agrees to enter drug treatment.

ILLUSTRATION TWO

The next case to be called is that of *State v. Laura McManna*, an update on a defendant who entered the drug court program some months before. Looking at the computer monitor on the bench, Judge Smith sees that Ms. McManna tested positive for cocaine when she came into the drug court for her first update on her progress in treatment. Since receiving a sanction of two days' court-room observation at that time, however, Ms. McManna has stayed off of drugs, testing negative for a total of three months. Reports from her in-patient treatment provider, Pine Hills Rehabilitation Facility, indicate that she is complying with the rules and regulations of the program.

"Ms. McManna," Judge Smith begins, "I see you continue to do well in your program and that your drug test results continue to come back clean. Do you know what you looked like when you first came before me? If you need a reminder, I can show you a photo that was taken three months ago. Now look at you: clean, well-dressed, ready to take on the world. I am very proud of you. More importantly, however, you should be very proud of yourself."

"I am, your honor," Ms. McManna replies flashing a smile.

Defense counsel Simkins chimes in: "Judge, I also wanted to point out Ms. McManna is in the process of preparing to take her GED exam."

"That's great," Judge Smith replies, "I'm sure going back to get your diploma isn't an easy thing. It sounds like you're really taking control of your life. And, since you are doing such a great job, I think it's time you were rewarded."

Judge Smith steps down from the bench and walks towards the defense table carrying a leather-bound journal. "Ms. McManna, we'd like to present you with this award for all your hard work. You can use this to keep track of your progress through treatment. Congratulations and keep up the good work."

As Judge Smith hands the journal to Ms. McManna, the whole courtroom, including defense counsel Simkins, assistant district attorney Phillips, the courtroom officers and the judge's clerk, begin to applaud.

As the applause dies down, Mr. Simkins remains standing. "Your honor, since Ms. McManna is doing so well in her treatment program, we would like to make a request. Ms. McManna wishes to complete her treatment at an out-patient program rather than at Pine Hills. After she takes her GED exam next week, Ms. McManna is interested in trying to go back to work. Your honor has recognized how well she is doing, and I think Ms. McManna will be able to make it in a less structured program. I would suggest an outpatient program with daily reporting and weekly drug test requirements to give her the guidance she needs."

Judge Smith asks the state about its position. Assistant district attorney Phillips tells Judge Smith she would take no position as to the request. She agrees that Ms. McManna is doing very well, but is not sure if switching to an out-patient program at this time would be in her best interest.

"Counsel," Judge Smith begins, "I share the same concerns as Ms. Phillips. While I have tremendous faith in Ms. McManna, the in-patient program she has been in is obviously working for her. I am afraid if we change things now, we might run the risk of going back to square one. What I will do is talk with our clinical director during the lunch break and see what she has to say."

Closing down the court for lunch recess, Judge Smith stops by the office of the drug court's clinical director, Bill Brown. Mr. Brown supervises the court's social workers, and he is recognized to be the court's authority on the various community-based treatment programs used by the court. In speaking to Mr. Brown,

Judge Smith learns that 90% of those defendants who are able to successfully complete the first phase of the court's treatment component—remaining clean for four months—have either successfully graduated from the program or are still active in treatment after two years. As a result, it was Mr. Brown's opinion that it is very important for all defendants to be given as much support as possible to make it through phase one. With regard to Ms. McManna, Mr. Brown believes it would be best for her to remain in the in-patient program, at least until she makes it past the four month threshold.

Returning to the courtroom after the lunch break, Judge Green recalls Ms. McManna's case. "Ms. McManna, I have given your request a good deal of thought and have spoken with our clinical director, who is an expert on drug addiction. At this time I think you should continue at Pine Hills. If you are able to make it through the next month and stay clean, I will reconsider your request to be placed in an out-patient program. I am sure this is a disappointment for you. But please understand this is not meant to punish you. We all just want you to be able to graduate from the court."

ILLUSTRATION THREE

Before reaching the next case on the status calendar, *State v. Frank Granada*, Judge Smith calls Mr. Simkins and Ms. Phillips into his chambers. "Counsel," Judge Smith begins, "what are we going to do with Mr. Granada? He tests clean for a while, seems to be doing well, and then just up and leaves his program. I got a report from Mr. Granada's social worker, Sandra Morris, that he absconded from the New Horizons program last week during an outing. He didn't call the program, didn't call the court, and didn't turn himself in. Instead, he was picked up on the warrant this morning after he was found sleeping on a bus. He tested positive for cocaine."

Judge Smith, the attorneys, and Ms. Morris, discuss Mr. Granada and his history with the court. The first time Mr. Granada left the program—a month ago—and came back on a warrant, the court sanctioned him with five nights in jail, as per the terms of the treatment agreement he signed when he entered the court. According to the agreement, when a defendant leaves a program a second time and involuntarily returns to the court, a sanction of between 15 and 28 days in jail will follow. A third time would result in termination from treatment and imposition of final sentence.

"Well your honor, I think Mr. Granada should be given the full jail sanction under the terms of his treatment agreement," Ms. Phillips tells Judge Smith. "A month in jail might go a long way towards teaching Mr. Granada a lesson about taking the program seriously. He's on the edge right now and needs to understand there can be no more next times. If he leaves the program again, he goes to jail on his sentence."

"Clearly there is something going on here with Mr. Granada," Mr. Simkins joins in. "But I'm convinced that sending him to jail for 28 days is not going to serve him well. I personally think the most important thing is for him to get back in treatment as quickly as he can. I've talked to Mr. Granada and he wants to give treatment another try. However, he mentioned having a number of problems with his current counselor at the program. Judge Smith, I urge the court to return Mr. Granada to New Horizons as soon as possible. Mr. Granada can succeed in this program if he is paired with a new counselor. I'm sure Ms. Morris's intervention with the people at the treatment center would go a great distance toward arranging for this change."

Ms. Morris tells the court that the New Horizons program is willing to give Mr. Granada another chance—but that they won't have another bed available for two weeks or so. She also confirms that Mr. Granada was having some difficulties with his counselor at the facility.

"Okay," Judge Smith says, "let me think about what everyone has said. I tend to agree that he should get back on track as quickly as he can. But he has to understand he can't just make up the rules as he goes along."

Thirty minutes later Judge Smith returns to the bench and calls Mr. Granada's case. "So, Mr. Granada, I see we decided to take another walk from treatment so you could use drugs again. Your test results were positive for cocaine when you were brought in. I guess you thought that the agreement you entered into when you pleaded guilty in this case meant nothing."

"No, your honor, that is not true. I left New Horizons but I was going to go back. I only left to visit my aunt. She's real sick. And, I didn't use cocaine when I was out. I took one of my aunt's pain killers for this back injury I have—maybe that's why the test is positive. But, I didn't shoot up. I swear it." Mr. Granada responds.

"Mr. Granada, I simply don't believe you. I don't think you visited your aunt, I don't think you had any intention of going back, and I don't think you used a pain killer. You want to know what I

do think? That you are simply in denial about your addiction. Now, don't you think it's about time you started to take responsibility for your actions? Mr. Granada, I am willing to give you another chance at treatment, but you are going to have to recognize you have a problem and recognize that you need help. If you don't complete treatment, you'll be facing four years in jail. Is that what you want, Mr. Granada?"

Defense counsel Simkins begins to respond on behalf of Mr. Granada, but is cut off by the court. "Counsel, I am talking to Mr. Granada. I want to hear what he has to say for himself." "Well, no, your honor, I don't want to go to jail. I want another chance at treatment. You're right. I messed up—but that guy over there at New Horizons, my counselor, he just keeps pushing my buttons."

"Mr. Granada, if by pushing your buttons you mean confronting you about your drug problem, I hate to tell you—that's just part of your therapy. No one told you this was going to be easy. But, you can't keep running from the program anytime you feel like it."

"I'll tell you what I am willing to do Mr. Granada," Judge Smith continues, "I'm going to send you to jail for the next fifteen days to cool out and give you some time to think about getting clean. In the meantime, we are going to have the social workers here talk with New Horizons and find out about getting you sent back to the program—if they'll still take you."

"Fifteen days?" Mr. Granada exclaims, turning to his attorney. "The last time I only got five days. Man, how can he give me so much time? I said I'd go back to the program."

Judge Smith explains to the defendant, "Mr. Granada, when you entered your guilty plea, you agreed to abide the court's sanctions schedule. And, here is a copy of your treatment agreement. It says right here in black and white that the sanction for leaving the program two times and coming back involuntarily is 15 to 28 days in jail."

Judge Smith, seeing Mr. Granada looking over the treatment agreement instructs him: "Turn to the final page of that agreement, Mr. Granada. Whose signature is that at the end of the document? Is that someone else's name? No, it's yours. No one forced you to sign that or told you that you had to enter a program. No, you were smart enough to know that you needed treatment—that the agreement was for your own good. So you see, Mr. Granada, you are quite lucky I am sending you to jail for fifteen days instead of a month, which I could do."

As Mr. Granada is being led out of the courtroom by the court officers, Judge Smith calls in the drug court social worker, Ms. Morris, and tells her to let him know what happens with New Horizons. "If they'll take him back" he tells her, "let's see if they are willing to switch him to another counselor's caseload. Maybe that will help him stay in the program."

After his exchange with Ms. Morris, Judge Smith turns to the attorneys in front of him and asks: "So, what do you think? Will he complete the program?"

Ms. Phillips shrugs and tells the judge she hopes that Mr. Granada makes it. Mr. Simkins agrees that its not clear whether Mr. Granada will make it, but he thinks a change in counselors certainly will improve Mr. Granada's chances.

* * *

According to a 1999 Department of Justice report, since the implementation of the first drug court in Dade County, Florida in 1989, over 357 drug courts have opened their doors. Plans for the creation of another 220 drug courts are underway. Based upon data from the 200 oldest drug courts in the United States, it is estimated that of the approximately 100,000 participants who have entered into drug court programs, 70% have either graduated or are still enrolled. According to one Department of Justice report, this retention rate is more than double the retention rate for traditional voluntary treatment programs. A number of studies have also demonstrated that drug treatment courts provide a tremendous cost savings to the justice system, given the extent to which drug court defendants are diverted away from pretrial detention and incarceration upon adjudication. Moreover, while additional, longer term studies need to be done, preliminary research indicates that criminal behavior is lowered by program participation, particularly for those defendants who graduate from drug treatment court.

APPENDIX 2***CASE STUDY: BROWNSBERG COMMUNITY COURT²¹⁸****CONTEXT**

Starting with the publication of the landmark essay, “Broken Windows” by George Kelling and James Q. Wilson in 1982, police and prosecutors have begun to recognize that creating and maintaining safe communities requires keen attention to quality-of-life crimes. Many cities have seen increased enforcement of offenses like illegal vending, prostitution, and vandalism. Unfortunately, few courts have been equipped to handle the infusion of petty cases. For example, over the past decade, the number of misdemeanor cases in New York City increased by 85% while the number of criminal court judges remained constant. Overwhelmed by staggering caseloads, many courts, particularly in urban areas, struggle to get through their daily calendars. All too often, individuals charged with low-level offenses are sentenced to nothing more than the process of being arrested and arraigned. In New York, a review of a random sample of misdemeanor cases from 1992-93 showed that roughly half of the defendants received “walks”—sentences where no additional conditions were placed on defendants. The consequences of this are significant, both within the criminal justice system, where cynicism is rampant, and among the general public, where public confidence in courts has suffered.

BACKGROUND

The city of Brownsberg is a busy metropolis of more than one million people. Its downtown area has long drawn both residents and visitors from outside the city looking for entertainment. With

* EDITOR’S NOTE: This Case Study has been reprinted with permission from the Center for Court Innovation. The Case Study has undergone only minimal editing.

218. This case study is one of a set of case studies written by the Center for Court Innovation in 2000 as part of the briefing materials for a series of roundtables that brought together leading academics and practitioners to explore some of the ethical and legal challenges presented by problem-solving courts. These case studies were not intended to describe best—or even appropriate—practice in problem-solving courts. Instead, they were deliberately written to highlight possible tensions between problem-solving courts and traditional practice in the courts and to provoke conversation among roundtable participants. The case studies were written by a team that included: Greg Berman, John Feinblatt, Scott Schell, and Mae Quinn. The Center for Court Innovation would like to offer thanks to the following people who commented on earlier drafts of the case studies: Cait Clarke, Susan Knipps, Eric Lane, Roy Simon and Michael Smith.

a heavy concentration of bars, clubs, restaurants, movie theaters, and hotels, downtown is seen as both the seediest and trendiest part of the city. For many, the downtown area's noise, traffic and general commotion are part of its attraction.

The area has also long been known for low-level criminal activity: prostitution, drug dealing, public drinking, and vandalism. About five years ago, disorder started to become more pervasive. People seeking entertainment started avoiding the area after dark. Businesses suffered. Empty, unlit storefronts, in turn, invited additional crime.

To local residents and business people, it seemed that the justice system was doing little to slow this downward spiral. Brownsberg's centralized criminal court, bogged down with serious criminal matters and a huge backlog of cases, spent little time on downtown's relatively unimportant quality-of-life offenses. Less than one half of 1% of the misdemeanor cases went to trial. More than 75% of misdemeanor cases were disposed at arraignment. The most common sentence for these minor crimes was "time served"—the time a defendant spent locked up awaiting arraignment. The process had become the punishment. Thus, there was no real differentiation between those who were guilty of the crimes charged and those whose cases were dismissed. After a day spent in the arrest-to-arraignment process, many defendants simply returned downtown and resumed their commission of petty offenses. After a while it seemed that police started making fewer arrests of low-level offenders, seeing such work as a waste of time. Why should they bother if the courts were simply going to release offenders without punishment?

Block associations and other citizens groups banded together to try to stem the deterioration of their neighborhood. They wrote letters to their legislators, met with city agency officials, and complained to the police. Uniformly, they received a sympathetic but unhelpful response: "the system" wasn't working, but no one knew how to fix it.

Then at a conference on urban justice two years ago, a court administrator who lived in Brownsberg heard a presentation about the Midtown Community Court that had been created in New York City in 1993. He wondered if that model would work in his city—could a court work hand-in-hand with the community to address the problems plaguing downtown Brownsberg? Could such a court slow or even reverse the steady decline in the area's quality of life?

PLANNING

Towards this end, over several months, planners from the Brownsberg court system conducted focus groups with neighborhood residents, local business owners, criminal justice experts, police, social service providers, and others to ascertain the exact nature of the concerns and needs of the downtown area. Nearly everyone involved expressed frustration with business-as-usual, which took low-level offenders to a centralized court far removed from the downtown area, and hardly ever provided more than the proverbial slap on the wrist for those who committed crimes. Those who were sentenced were seldom made to pay back the downtown community for their wrongdoing. It was clear that both the community and the local police blamed the government in general, and the court system in particular, for failing to do enough. For them, the courts seemed to be little more than a revolving door, which did not do enough to restore their neighborhood or prevent criminals from re-offending.

In addition to wanting local, quality-of-life crimes to be taken more seriously, many of those who participated in the focus groups also pointed out the value of providing help for those committing crimes in the neighborhood. Shoplifters were often drug addicts who stole to support their habit, many prostitutes were believed to be runaways, and some offenders were homeless or suffered from mental illness. Even police officers complained that they were aware of no social service programs or agencies to which they could refer offenders they came across on their beats.

With funding from area business owners, further research and study were conducted. A new model court was proposed, one that would specifically focus on minor offenses, impose a broad array of sentencing alternatives, and also offer on-site social services for offenders. However, such a court would need significant funding and a place to conduct business. Again, area business owners pitched in—providing a building for the court's use and providing funds to pay for on-site social services. Judge Sandy Green, who had sat at the downtown courthouse for four years, was asked to preside over the new court. Brownsberg's administrative judge for the criminal courts selected Judge Green for the assignment based on her skill at dealing with the public and her willingness to "think outside of the box."

Despite overwhelming support for the new court among court administrators and local civic groups, there were a number of skeptics. For instance, some of Judge Green's colleagues on the bench

expressed concern. At a local judicial luncheon, Judge Green was approached by Judge Sarah Wallace, a judge in the centralized criminal court. Judge Wallace told Judge Green that the community court was already causing problems before it even opened. At sentencing hearings, defense attorneys were citing the planning of the community court as grounds that Judge Wallace should be providing social service-type sentences. In the alternative, they were arguing their cases should be put off to be handled in the community court. Judge Wallace told Judge Green she was concerned about the way in which the community court might impact the practices and proceedings in the centralized criminal in the future. Would there be two brands of justice in Brownsberg?

In addition, the public defender serving Brownsberg was cautious in his support of the new court. The defense bar feared defendants would be facing sanctions from the community court judge for cases that seldom would have been pursued at the centralized courthouse. They also felt that the possibility of different results in different courts based solely on arrest location was unfair and that the new court would further fragment an already complicated and overworked justice system. Despite these concerns, the court's commitment to providing services to low-level defendants made it appealing to many defense attorneys.

COMMUNITY COURT MODEL

Judge Green's Community Court is very different from many other urban court complexes. The court has an inviting and accessible interior: clean, well-lit, and orderly. Entering the courthouse, visitors are greeted by court security staff and directed to the proper location. Inside the courtroom, television monitors display the status of cases on the day's calendar. Both the judge and the attorneys use computers in the courtroom to learn more about defendants with whom they are dealing.

The court is a misdemeanor arraignment facility which has the specific goal of helping to solve problems specific to the downtown area. All defendants charged with quality-of-life crimes and other low-level offenses in the downtown area are brought by police to the Community Court rather than the centralized court for their first appearance. In this way, these cases are not lost in the shuffle between more serious matters and move quickly from arrest to arraignment.

Prior to arraignment, defendants at the Community Court are interviewed by a Brownsberg's pre-trial agency as part of the regu-

lar bail recommendation process. For the purposes of the Community Court, the standard interview has been expanded to include background information on each defendant's drug use, housing situation, and health status. This self-reported information (which is collected on a voluntary basis) is added to the court's computer database so that Judge Green immediately knows about a defendant's prior criminal record, housing status, employment status, mental health issues, and current drug use.

Once community court defendants come before the judge, usually the same day as their arrest, community court defendants are extended a plea offer. Defendants who do not wish to plead guilty have their cases adjourned to the centralized court for further proceedings. Those who do accept the offer immediately proceed to sentencing. The speed with which these cases move from arrest to arraignment to plea to sentence helps to impress upon offenders that consequences do follow from their criminal behavior. Moreover, it reduces the risk of non-compliance on the part of sanctioned defendants, who begin their sentences soon after their arraignment rather than weeks later.

Sentences imposed by Judge Green are meant to meet the needs of both the defendant and the community. Towards this end, all crimes—even those that may have gone essentially unpunished before—receive some sanction. Defendants are almost never sent away with the sentence of “time served.” During planning, statistics revealed that over one quarter of the defendants at the centralized court were sentenced to the time they had already spent in the lock-up awaiting arraignment; the community court imposed that sentence in less than one percent of its cases.

The judge has many different sentencing options at her disposal at the community court. Almost all defendants are required to perform community service in order to pay back the neighborhood they have harmed. These projects, supervised by a community service coordinator employed by the court, include graffiti removal, improvement of park gardens, or office assistance for local non-profit organizations. Because community service sentences commence quickly after a defendant's conviction, compliance rates are much higher than they were when such cases were handled at the centralized court.

A wide range of social services are also available under one roof at the community court, making it a gateway to assistance. For instance, as part of their sentences, many defendants are mandated to participate in short-term programs such as drug-treatment readi-

ness sessions. These readiness sessions introduce the idea of drug treatment to addicts who have committed offenses (criminal trespass, prostitution) too minor to warrant mandated long-term treatment, but who nonetheless are in need of help. Because these services are available on-site, social services-based sentences can also commence promptly. For defendants, being arrested becomes an opportunity to turn crisis into a second chance. Indeed, while they serve their sentences, court staff continue to engage defendants, encouraging them to take advantages of the array of services the court has to offer. As a result, many defendants—as many as 1 in 5—voluntarily return to the court after their cases are closed in order to access programs available and receive further services such as vocational counseling and GED classes.

The judge frequently tests new sentencing options and court staff monitor the effectiveness of existing sanctions. Moreover, Judge Green maintains constant and open communications with all of the parties—both courtroom and non-courtroom players—about the workings of the court. She often requests feedback from the offices of the public defender and the district attorney. The judge also meets with the court's social service staff to learn about newly available programs and new clinical thinking regarding the effects of drugs or mental illness. Perhaps most importantly, every month Judge Green convenes a panel of community members and police officers to hear about concerns and changes in the community.

ILLUSTRATION ONE

It is Thursday at 7:30 p.m. Judge Green sits at a table in her chambers. With her is the community advisory board, a group of ten people who are invited to represent various segments of the neighborhood, including community leaders, business representatives, and law enforcement representatives. Also present are a number of court personnel.

Nina Elkins, the president of a local block association, has been informing Judge Green about the increasing problem of prostitution on her street: "The corner of Park and Main has been awful lately—nothing but prostitutes, 'johns,' and noise. The same cars—filled with guys looking to buy sex—drive around and around all night long. They shout and honk their car horns until the early hours of the morning. I can't get any sleep. Everyone in our building is sick and tired of it."

Ms. Elkins explains that things were the same way a few years back, but quieted down over time. "We thought the problem went

away, but here it is again. I realize that a lot of the prostitutes are just teenagers and drug addicts. I kind of feel sorry for them. But you've got to see these guys who pick them up. Most of them are older men driving nice cars with out-of-state plates. I don't feel so bad for them. I mean they're really to blame. I bet they don't drive around causing a ruckus in their own neighborhood. They're probably perfectly upstanding citizens there."

Nora Walsh, a local parent, offers a similar account as well as her thoughts on how "johns" should be handled. "You know, in some places they use really out-of-the-ordinary sentences for defendants who are caught soliciting a prostitute—like printing their name in the newspaper or taking away their car." Laughing, she continues: "Maybe we should try something like sentencing 'johns' to having someone honk a car horn outside their window at three in the morning every night for a month. At least then they'd know what it was like to live here."

Although her suggestion was made in jest, Ms. Walsh's comments strike a chord with Judge Green. Judge Green has always struggled with determining what kind of sentence is most meaningful in solicitation cases. What kind of punishment would both meet the concerns of the community and be useful for the offender? Maybe confronting these defendants with the community impacts of their crimes wouldn't be such a bad idea. But what would such a sentence look like?

Police officers Paul Perry and Patricia Prince inform the advisory committee that their precinct has received an increased number of calls about the corner of Park and Main. Officer Prince tells the group: "I think we may need to conduct another undercover sweep at that intersection."

Towards the end of the meeting, representatives from a local merchants organization, Stan Erickson and Fred Alberts, report to the judge that downtown has been hit by a wave of vandalism. Both men complain that their storefronts have been spray-painted with graffiti in the last month. "The same person must have done all the stores in the area," Mr. Erickson explains. "About ten storefronts had the same thing written on them: a giant 'Y2K' in red paint." Mr. Alberts adds "It's just not fair. I know one guy who has just about had it. He's thinking about closing down his shop and moving to the suburbs."

Judge Green tells the business owners she will look into sending a community service team to the area to remove the graffiti. The men seem very grateful that the problem will be addressed in this

way. "Wow," Mr. Erickson says, "That would be terrific. Let the group who made the mess clean it up for a change."

ILLUSTRATION TWO

"I thought we heard some really interesting things at the community advisory board meeting last night, didn't you?" Judge Green asks the staff with whom she is meeting. It is Friday morning and all of the court personnel have come together for their weekly session with the judge. Amongst those present are Aaron Alston, the court's community mediation expert, Byron Bradley, the community service coordinator, and Carrie Conroy, a clinical psychologist who works with the court, all of whom were also present for the community advisory board meeting.

Judge Green continues: "It sounds like the businesses have been hit pretty hard by vandals."

Byron Bradley agrees with Judge Green and tells her the community garden project that he started with a group of defendants two weeks ago is just about finished. "I'll be able to send a crew out to remove the graffiti starting tomorrow."

Judge Green continues, "The prostitution in the area is really getting to people, too. I really wish there were some other solutions available for those kinds of cases. I think we have some good alternative sentences available for drug offenders—like our treatment readiness program—but not a whole lot for prostitutes and johns. Do you have any ideas?"

Carrie Conroy responds: "I used to teach a health education class at a university health clinic," Carrie Conroy begins. "We used materials, which outlined the risks involved with unprotected sexual activity. I was thinking that the prostitutes might benefit from a similar class, but one that would really address the particular issues they face in their work. For instance, a number of the prostitutes I have dealt with think they are practicing safe sex because they use condoms with their clients, even though they have unprotected sex with their pimps. Maybe they could be sentenced to the class—which would dispel some of these myths—along with community service."

Judge Green thanks Carrie and tells her she would use such a class as a sentence for prostitutes if it were available. Carrie Conroy agrees to put curriculum materials together as soon as possible.

"As for this issue of the 'johns,'" Aaron Alston joins in, "I received some materials at a conference I attended in Washington D.C. that talked about restorative justice conferences—facilitated

conversations between offenders and victims. They say it helps offenders to realize that their acts have harmed the community, and it allows the community to play a role in the criminal justice process. A facilitator makes sure the whole thing is balanced and that all participants are given a chance to be heard. I thought it was an interesting concept and had been wondering what kind of cases might be appropriate for that kind of meeting.”

After a discussion of the pros and cons of such an approach, Aaron Alston tells the judge he will contact organizations using such conferences to learn more about what they are doing. “I think it would be a good idea to try as a new type of sanction for ‘johns’,” Aaron says. Judge Green agrees and encourages him to keep her informed.

ILLUSTRATION THREE

It is the first Monday in June. Judge Green is on the bench handling new matters. The first case she calls is *State v. George Rojas*. Mr. Rojas is charged with defacing private property. As she reads through the complaint on the computer, Judge Green sees that Mr. Rojas was allegedly seen spraying the phrase “Y2K” on the side of a delivery truck. Judge Green immediately connects this defendant with Mr. Erickson’s report about the vandalism to his building two months before.

As a community court judge, Judge Green often sees the same defendants over and over. It also happens, from time to time, that she learns information from the community or police about an offender she later sees in court.

“Your honor, given that Mr. Rojas has already spent the night in jail, we would be willing to accept a plea to disorderly conduct and recommend a sentence of time served,” Assistant District Attorney Wanda Wright tells the judge.

Judge Green thinks about the government’s offer. The charge of disorderly conduct, a lesser offense than defacing private property, has a lower statutory maximum penalty. The sentencing recommendation made by the government is the standard offer made at Brownsberg’s centralized court to defendants who have no prior criminal record. However, it is an unusual recommendation for the Community Court, which typically sentences offenders to perform community restitution.

“Do you want to take a moment to re-think your offer, counselor?,” Judge Green asks. “I don’t see how time served does anything to pay back the community.”

Wright is quick to respond. "Judge, on second thought, we'd like to offer a plea to disorderly conduct and recommend a sentence of eight hours of community service, which I think will send a strong message to Mr. Rojas about the impact of his behavior."

After conferring with his client, Mr. Rojas's defense attorney accepts the offer. "Very well," Judge Green announces and engages the defendant in the required plea colloquy. Mr. Rojas acknowledges the court's power in this regard and admits that he has painted the term "Y2K" on the side of a delivery truck.

Before imposing sentence, Judge Smith reviews background information about Mr. Rojas on her computer screen. She sees he has no prior criminal record and lives with his parents in an apartment in the next town.

Judge Green admonishes Mr. Rojas: "Do you realize the extent to which graffiti harms this part of town? Business-owners cannot afford to keep cleaning up after people like you who decide they want to destroy property. If these businesses are driven out of downtown we all suffer—including people like you and your family who don't live here. I am very tempted to hit you with a much harsher sentence than the one the government has recommended. But I will stick with the district attorney's proposal—eight hours of community service—because according to your record this is your first offense. Mr. Rojas, I certainly hope that we don't ever see you again, because if there is a next time you'll be seeing jail time. I hope doing community service work to pay back the community makes you think twice before you commit another crime here."

Later that day, Mr. Rojas is taken by the community service coordinator with a group of defendants to start his community service time. Transported in a van that says "Justice at Work" on the side and wearing orange jumpsuits, the defendants are delivered to the area of downtown where Mr. Rojas was arrested and required to paint over graffiti.

ILLUSTRATION FOUR

Since the last advisory board meeting, Aaron Alston, the court's community mediation specialist, has worked to create the restorative justice sentencing option for "johns." This sanction—which the court is calling a community impact panel—requires defendants convicted of solicitation to participate in a facilitated conversation with selected members of the community for two hours. Unlike other victim-offender panels, it is not voluntary. Unlike other restorative justice groups, the goal is not for the community

to fashion a sentence. The plan is to have three defendants and three community members take part in each meeting. All panel conversations would have certain parameters—the community would let the offenders know how they have affected the community; the offenders would be permitted to respond, to apologize, and to explain what draws people to commit crime in the area. And, each conversation would be facilitated by Mr. Alston to ensure that each party has an opportunity to be heard, the conversations are respectful, and they do not stray off point.

Recently, attorneys assigned to the Community Court met with Judge Green and court administrators to learn more about the new sanction. At the meeting, Judge Green suggested the prosecutor's office might offer the new sanction as part of its plea agreements; the office of the public defender was asked if it would keep an open mind and encourage clients to participate in the panel. The defense bar expressed concern that such sanctions were equivalent to public shaming and that defendants might make potentially damaging statements in the sessions. Judge Green assured defense counsel that the sessions would be private—only the participants and court staff would be present—and that the information disclosed in the conversations would not be used against the defendant by the court. Despite the judge's assurances, the defense bar did not whole-heartedly welcome the new sentencing option.

Today, Judge Green is handling the first solicitation case to reach the court after the creation of the community impact panel: *State v. Ronald Slip*. As Mr. Slip is brought out of the lock up, Judge Green reviews the information on her computer screen. According to the criminal complaint, Mr. Slip was arrested at the corner of Park and Main—the very area that community members talked about during the last advisory panel meeting—for soliciting sex for money from an undercover police officer.

"Your honor," says the Assistant District Attorney assigned to the court, "If Mr. Slip pleads guilty to solicitation in this matter, we will not seek jail time. Rather, we would recommend that he participate in the new impact panel program that the Court has established."

Judge Green knows that Mr. Slip, with no prior criminal record, would not be sentenced to jail time under any circumstance. It is likely that his defense attorney, Susan Jones, has already informed him of this. If Mr. Slip refuses the plea offer, his case would be adjourned to the centralized court. However, Ms. Jones knows that requesting an adjournment of the case to the centralized

docket for further proceedings would require Mr. Slip to make additional trips to court, particularly if he ultimately proceeds to trial. These trips would occur during business hours and would require time off from work for the defendant. Any failure to appear would result in the issuance of a warrant—and a stiffer sentence should Mr. Slip be re-arrested. Given her knowledge of these factors, Judge Green thinks it is likely this defendant will enter a guilty plea today in order to quickly put this matter behind him.

However, defense attorney Jones objects to the prosecutor's recommendation. "Your honor, I'm not sure I feel comfortable counseling my client about whether he should take part in this new experimental sentence being offered. I understand what it is, but there still seem to be a number of unknowns involved."

In response, Judge Green explains to Mr. Slip that the purpose of the impact panel is for him to learn, directly from members of the community, about the impact of his actions. Judge Green assures Mr. Slip that the court's mediation expert will be present to monitor the conversation and that what is said there will remain private. Judge Green then asks Mr. Slip's attorney to take a few moments to discuss the new offer with his client. After a few moments of whispering to his client, Mr. Slip's attorney turns to the bench: "Judge, Mr. Slip wishes to enter a plea of guilty at this time and will accept the government's offer. I have discussed the impact panel with Mr. Slip and he understands all that it entails."

Mr. Slip's plea is accepted by the judge and he is sentenced to participate in the first panel, which is scheduled for a Wednesday evening the following week. Judge Green knows which community members have been asked by court administrators to participate in the panel—Nina Elkins and Nora Walsh—the two individuals who were so vocal during the advisory group meeting about the impact of prostitution on the community.

Following the first impact panel session, the one in which Mr. Slip was ordered to attend, Judge Green reads the comment forms that were filled out by all of the participants—both defendants and community members. While some suggestions were made to improve the process, the comments were overwhelmingly positive. The community members felt that they had had a chance to participate in the justice process and voice their concerns in a meaningful way. Though it appears that Mr. Slip said little, he apologized for his behavior and acknowledged that the panel had been conducted as advertised.

* * *

In 1993, the country's first community court—the Midtown Community Court of New York City—opened its doors. The court was designed to go beyond the routine processing of low-level crimes and to help resolve problems that were specific to New York City's midtown area—including the high concentration of low-level quality of life crimes. According to independent evaluators, the Midtown Community court has reduced arrest to arraignment time and improved compliance with community service by 50%. Low-level crime in the neighborhood has dropped by as much as 63% in the case of prostitution. And focus groups with police, defendants, and residents revealed improved confidence in courts. These results have spurred other jurisdictions to follow Midtown's lead. Six community courts have already opened, and another two dozen are in the planning stages.

APPENDIX 3*

CASE STUDY: WEST JACKSON DOMESTIC
VIOLENCE COURT²¹⁹

CONTEXT

The criminal justice system has long had difficulty in calibrating its response to domestic violence. Over the past 25 years, it has moved from a vision of domestic violence as primarily a private matter to increasing recognition that domestic violence is a criminal offense meriting traditional criminal justice responses. More recently, prosecutors and courts have experimented with approaches that acknowledge that domestic violence is intrinsically different from other criminal offenses without abandoning the recognition that domestic violence is first and foremost a criminal matter. These initiatives are a response to both increased public awareness about domestic violence and a significant growth in domestic violence cases.

According to the Justice Department's Bureau of Justice Statistics, each year in the United States there are an estimated 960,000 incidents of physical violence against a current or former spouse, boyfriend, or girlfriend,²²⁰ and roughly 85% of these victims are women.²²¹ Approximately 30% of female homicide victims are killed by an intimate partner or former intimate partner. Though

* EDITOR'S NOTE: This Case Study has been reprinted with permission from the Center for Court Innovation. The Case Study has undergone only minimal editing.

219. This case study is one of a set of case studies written by the Center for Court Innovation in 1999 as part of the briefing materials for a series of roundtables that brought together leading academics and practitioners to explore some of the ethical and legal challenges presented by problem-solving courts. These case studies were not intended to describe best—or even appropriate—practice in problem-solving courts. Instead, they were deliberately written to highlight possible tensions between problem-solving courts and traditional practice in the courts and to provoke conversation among roundtable participants. The case studies were written by a team that included: Greg Berman, John Feinblatt, Scott Schell, and Mae Quinn. The Center for Court Innovation would like to offer thanks to the following people who commented on earlier drafts of the case studies: Cait Clarke, Susan Knipps, Eric Lane, Roy Simon, and Michael Smith.

220. In some jurisdictions, intimate or domestic violence is defined more broadly to include same sex partnerships and non-physical (e.g., emotional and economic) abuse as well as physical violence. Measured with this definition, the number of domestic violence incidents per year would be larger.

221. Unless otherwise noted, the statistics in this “context” paragraph are taken from LAWRENCE A. GREENFELD ET AL., U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS FACTBOOK: VIOLENCE BY INTIMATES: ANALYSIS OF DATA ON CRIMES BY CURRENT OR FORMER SPOUSES, BOYFRIENDS, AND GIRLFRIENDS (1998).

just one in five female victims who are injured by domestic violence seek professional medical treatment, approximately 40% of women visiting emergency rooms for injuries caused by intentional violence received those injuries from an intimate. The caseloads resulting from domestic violence offenses are large, even with *half of domestic violence incidents going unreported to the police. In 1998, the combined volume of felony and misdemeanor cases in New York City's Criminal Court exceeded 25,000—more than one out of five pending criminal cases.*²²²

BACKGROUND

Judge Charles Henderson has been a criminal court judge in the city of West Jackson for almost a decade. He currently presides over its recently developed specialized domestic violence court.

Before taking the bench, Judge Henderson served as a prosecutor for over twenty years. During his tenure with the office of the district attorney, perhaps the most difficult cases he dealt with were those involving crimes of domestic or intimate violence.

Often, the first hurdle was getting the police department to take incidents of domestic violence seriously. Many officers who responded to domestic violence calls viewed these matters as private family disputes better resolved by the parties themselves than the criminal justice system. Officers untrained about the nature of domestic abuse and unaware of the grave dangers faced by complainants often handled such calls without making an arrest or providing assistance to the complainant. Indeed, in many instances persons accused of battering were simply told by police to cool off at a friend's house overnight or to take a walk around the block.

Even if an arrest was made, however, these cases presented many other concerns. For a variety of reasons, women who were abused frequently did not wish to press charges or testify against their batterers. Many feared retaliation by their partners and, particularly, the violence which frequently occurs as a result of attempts to separate. Others were economically dependent upon their partners, and worried that going forward with prosecution would leave them and their children destitute. Non-citizen victims sometimes sought to withdraw complaints because they were convinced they would be deported otherwise. As a result of these complexities, many criminal cases against batterers never went for-

222. CRIMINAL COURT OF THE CITY OF NEW YORK, THREE YEAR OPERATIONAL PLAN, 2000-2001 THROUGH 2002-2003, at 5-12.

ward, either because of an explicit request by the victim to have the case dismissed or her failure to respond to a subpoena to testify at trial.

Even in cases that were prosecuted, the special dynamics of domestic violence often were not adequately taken into account. At sentencing hearings, unless a case involved serious physical harm to the victim, defendants were often sentenced to “straight” probation terms without any conditions. Because domestic violence cases were commonly viewed as private “family matters,” the sentences imposed were frequently lighter than those for ordinary assault upon a stranger—even though research reveals that the risk of continued victimization is far greater in a domestic violence case. In many instances, defendants who were out on bail often continued to harass their partners, frequently coercing them to withdraw their charges, or worse, continuing to physically harm them. Throughout the process, the complainant was essentially viewed as a mere witness needed to testify at trial. Children in the household were given virtually no consideration at all. Complainant safety was not of paramount concern; support services for victims were not being provided; defendants were not being adequately monitored; and justice, it seemed, was not being served.

After he took the bench, Judge Henderson continued to grapple with the difficulties presented by domestic violence. By that time, attitudes had begun to change about domestic abuse—a battered women’s shelter had opened in the area, the press often reported the stories and statistics relating to relationship violence, and domestic abuse finally began to be viewed by the public and by elected officials as a widespread social problem. Nonetheless, without changes to the system, judges had neither the time nor the resources to give domestic violence matters the attention they required. Time and again, judges were asked by prosecutors to dismiss the domestic violence cases on their dockets. Even Judge Henderson felt he had to close those cases the government moved to dismiss, despite his concerns about what might happen to the victim and her family afterward.

In 1995, however, a highly publicized tragedy in West Jackson forced everyone to rethink the way domestic violence was being handled, particularly by the court system. A defendant, charged with assaulting his girlfriend, returned home to kill her after being released without conditions pending trial. A review of the case revealed that the matter had been passed among the dockets of three judges and had been handled by two different lead prosecutors.

The public was outraged by the murder; it appeared that no one within the court system had taken responsibility for the case.

PLANNING

In response, the state court's administrative judge created an advisory board to consider what the court could do to prevent future tragedies. The board consisted of judges, prosecutors, public defenders, police officials, probation officers, social service and mental health agencies, and others with expertise in the area of dealing with both abusers and victims of domestic violence. After many meetings, the advisory board produced a report recommending that West Jackson create its own specialized domestic violence court, following the lead of places like Quincy, Massachusetts.

The explicit goals of the court would be to ensure the safety and well-being of victims, and to hold defendant's accountable. To provide domestic violence victims the special services and protections that they previously lacked, it was suggested that all complainants be provided with victim advocates. These advocates would help guide complainants through the process, providing referrals and support, acting as a liaison to the justice system, and assisting in developing safety plans. Judges, it was proposed, should closely monitor defendants charged with acts of domestic violence who were not held pending trial. The advisory board also advocated greater coordination among the criminal justice players, including judges, police officers, the probation department, and others, such as battered women's shelters, in order to ensure effectiveness and consistency in response to domestic violence matters.

When the advisory board's report was released, the local defense bar's reaction was mostly negative. They were opposed to the creation of a specialized domestic violence court and argued that a court with the expressed goal of ensuring victim safety would undoubtedly infringe fundamental protections for defendants, including due process and the presumption of innocence. In particular, they expressed strong doubts about the planned pre-trial monitoring of all defendants and the form this supervision would take. A minority of the defense bar disagreed, arguing that active monitoring could help defendants avoid probation violations and that a judge specializing in domestic violence cases would be better equipped to consider the circumstances of battered women defendants.

West Jackson's prosecutors, on the other hand, were decidedly more sanguine, excited by the prospects of lower dismissal rates. Though some prosecutors worried about whether this new court would lessen their role in determining which cases were to be treated as domestic violence cases, they were largely supportive and undertook plans to create their own separate domestic violence unit.

The court system decided to authorize the creation of an experimental specialized court in West Jackson. Judge Charles Henderson was asked to preside over the new court, which would handle both felony and misdemeanor cases. After taking on that task, Judge Henderson attended training seminars on the effects of domestic violence, visited domestic violence shelters around the country, and read hundreds of articles and books relating to domestic abuse in order to bring himself up to speed on the issues. With funding from the federal government, a resource coordinator was hired to help Judge Henderson run the pilot program.

DOMESTIC VIOLENCE COURT MODEL

Defendants arrested in West Jackson for charges stemming from an alleged incident of domestic violence—which is defined by statute as any abusive act directed towards a current or former spouse, boyfriend, girlfriend or same sex partner—still make their first appearance before the ordinary presentment court for an arraignment and initial bail determination. Prosecutors from the district attorney's domestic violence unit as well as victim advocates meet with the complainant—either before the defendant's initial appearance, or as soon thereafter as possible. The purpose of this meeting is not only to gather information for the bail hearing and the prosecution of the case, but to create a framework for getting the victim needed services and for keeping the victim informed about the status of the case, including whether a defendant has been released from jail.

Both the victim advocate and the prosecutor work with the complainant to devise a safety plan for herself and her children, if she has any. Housing at the local battered women's shelter is arranged if necessary, or the complainant might be encouraged to stay with family or friends. Victim advocates sometimes refer complainants to social service providers or organizations that can provide legal assistance in related family law matters—such as divorce proceedings or child custody disputes. Together, these efforts seek to create a feeling of safety for complainants working within the system.

After the initial presentment, where bail or conditions of release are set, the case is transferred to Judge Henderson's specialized docket for all further proceedings. Judge Henderson reviews every defendant's pre-trial status. He makes sure that defendants who are out on their own recognizance have been ordered to stay away from the complainant under a criminal order of protection. Defendants who are not held pending trial are required to attend a batterers counseling program once a week as a means of keeping tabs on them.

Another important feature of the court, differentiating it from traditional criminal courts, is its use of a resource coordinator. The resource coordinator is a full-time staff person, who sits in the well of the courtroom next to the judge and is responsible for making sure that problems in need of attention do not fall through the cracks. The resource coordinator receives ongoing status reports from batterers programs, victim advocates, probation officers, police and others: Has the defendant been complying with conditions of release? Has the victim moved to a shelter? This information, in turn, is communicated to the judge.

When defendants appear before Judge Henderson for their status hearings, the resource coordinator is present. For pre-disposition defendants, Judge Henderson holds a status hearing every two to three weeks. Prior to the hearing, the resource coordinator will provide the judge with an update, informing him of issues in need of attention, such as whether it is alleged that the defendant has contacted the victim or failed to attend the batterers program. When an issue is raised, the judge gives the defendant an opportunity to be heard and then may decide to detain the defendant pending adjudication, if it appears the defendant has been non-compliant. For defendants who continue to have problems, Judge Henderson may revoke the defendant's conditions of release. When an emergency arises—such as a defendant making threats to the complainant—the resource coordinator is immediately informed, usually by the victim advocate, prosecutor, batterers program, or other involved party. The resource coordinator will then have the case placed on the calendar for a prompt hearing so that the judge may respond swiftly.

In addition, the resource coordinator is responsible for sharing information about changes in the status of the case with the relevant parties and agencies. For instance, the resource coordinator informs victim advocates, batterer's intervention programs, and others about changes in a defendant's court-ordered conditions of

release. When domestic violence cases involve persons who have cases pending in the matrimonial court, the resource coordinator makes certain to inform the matrimonial court judge about findings of guilt or any other relevant developments.

Given the intense monitoring of defendants, the communication facilitated by the resource coordinator, and the range of services made available to complainants, few cases—only about 4%—result in dismissal in Judge Henderson’s court. Moreover, in the new court, many fewer defendants violate their conditions of release or fail to appear. In fact, at the end of its first year in operation, the court had only a handful of outstanding warrants for defendants failing to appear.

Defendants may proceed to trial or plead guilty in the domestic violence court. In either event, Judge Henderson usually handles the cases from start to finish—over 100 cases are on his calendar at any given time. There are no “straight” probation sentences in the domestic violence court; defendants placed on probation must return to court once every two months for close monitoring in addition to visiting regularly with their probation officers.

ILLUSTRATION ONE

It is the first Monday of the month and Judge Henderson has just entered a meeting. It is a large group. In attendance are a number of West Jackson police officials, probation officers, court clerks, prosecutors, public defenders, intervention counselors for batterers, staff from the local domestic violence shelter, victim advocates, jail staff, and the domestic violence court’s resource coordinator, Barbara Taylor. Judge Henderson calls these meetings—which he calls domestic violence court partner sessions—on a monthly basis to facilitate formal communications between all of the entities who work together on domestic violence cases.

The topic of today’s meeting is probation’s role in overseeing sentenced defendants. Judge Henderson has chosen this topic because of a recent case involving a probation officer who failed to notify the court of a defendant who missed a scheduled visit. The incident did not come to the court’s attention until two weeks after the no-show occurred.

“I can’t stress enough the importance of all of us working closely on these cases if we are going to make the domestic violence court a success. You know, as well as I do, how these cases work. We have to stay on top of these cases,” Judge Henderson continues, “even after sentencing.”

The assistant director of the probation department tells Judge Henderson he is aware of his concerns. "I know that there was some failure to follow-through on the *Carlyle* case, but I have had a long conversation with my staff. I think everyone now recognizes they must inform the court at the earliest possible juncture of any failure on the part of the defendant to comply with the terms of probation."

One of the public defenders interrupts: "Judge Henderson, we all know why today's topic is the oversight of sentenced defendants. But I thought one of your ground rules is that there is to be no discussion here of individual cases."

Judge Henderson agrees, reminding the group that the purpose of the court partner meetings is limited to improving communication and considering general policies and practices of the court. Returning to the matter at hand, Judge Henderson suggests the office take further action: "Maybe it would make sense for Ms. Taylor to go over and introduce herself to the probation officers. That way they could match a face with her voice on the phone. Perhaps it would help your staff to feel more connected to what we are doing at the court."

The director of the local battered women's shelter, Tara West, suggests that it might also be useful for her organization to provide a day-long training for probation officers. "I know that we came out to do a training on the dynamics of domestic violence when the court first opened, but it's been over a year. I bet there are a number of new officers who haven't been trained, not to mention some of the older officers who could benefit from a refresher course."

Police precinct captain Thomas Frederick tells the group about a training conducted for new officers in his precinct. "It really opened the eyes of a lot of those guys," the captain tells the group. "All of us should make sure new staff are properly trained to handle domestic violence cases."

Judge Henderson tells the probation department's representative that he would like them to accept Ms. West's offer.

After the meeting, the probation department follows through on both suggestions—inviting Ms. Taylor out to the office and requiring its officers to undergo a domestic violence training each year.

ILLUSTRATION TWO

Each year, the women's center at the state college hosts a conference on issues relating to domestic violence. This year they have invited Judge Henderson and asked him to speak about the

role of the judiciary in deterring violence against intimates. Judge Henderson's panel, billed as "The Government Response to Domestic Violence," includes an advocate from a victim's group, the chief of police, and a local prosecutor. During his ten-minute presentation, Judge Henderson explains the workings of the West Jackson specialized domestic violence court and shares his thoughts with the group on the need for meaningful judicial responses in domestic violence matters:

"In the past, our society viewed domestic violence as a private matter," Judge Henderson explains. "Problems between husbands and wives, boyfriends and girlfriends, and same-sex partners were considered outside of the law. Luckily, times have changed and courts all over the country have finally begun to work cooperatively with police, prosecutors, and battered women's advocacy organizations to protect victims, ensure their safety, and hold abusers accountable for their actions." During the question and answer period which follows, a female student talks about the fear and anger she felt at the time of the highly-publicized 1995 domestic violence murder in West Jackson. Judge Henderson responds by explaining that his domestic violence was created to address her concerns.

The following week, Judge Henderson receives a copy of the college newspaper. On the front page is an article about the conference he attended along with a photograph taken during his presentation. The caption under the photograph states: "Judge Henderson stands up for victims of domestic violence."

ILLUSTRATION THREE

Judge Henderson calls the matter *State v. Victor Chin*. Mr. Chin is accused of assaulting his girlfriend, Wanda Smith. At the time of his arrest, bail was set at \$10,000. Mr. Chin was unable to post the money bond to make bail, and his attorney asked for a hearing before Judge Henderson to request a reduction in the bail amount.

At the hearing, Assistant District Attorney George Tyler indicates that the State will agree to a lower bail amount, if the court imposes a curfew on Mr. Chin and requires that, while he is out on bail, Mr. Chin attend an intervention program for batterers. "Your honor, this is a case with strong evidence. Last Saturday night, in the parking lot of a popular West Jackson bar, two witnesses clearly saw Mr. Chin first shove Ms. Smith up against a car, and then pull her into the car by her hair. Clearly, this is a defendant who needs close supervision."

The defense counsel argues that Mr. Chin has no prior record of domestic violence and that he is being punished without being found guilty. "Your honor, once Mr. Chin is forced to enter a batterer's intervention program, his reputation will be seriously harmed. The program will interfere with his work and could jeopardize his job. If the allegations in this case involved strangers, you would not be ordering any kind of condition of release—let alone a batterer's program. There is no reason for such a requirement to be imposed in this matter. This is an isolated incident. My client has never been accused of any other crime."

Judge Henderson responds that this case isn't about strangers, it's about domestic violence—which presents a host of different issues from ordinary assault cases. "So, while a defendant is out on bail in my court, he will be taking part in a program."

Speaking directly to Mr. Chin, Judge Henderson warns: "Sir, let me explain my order to you. Until this order is terminated, you are subject to a curfew, requiring that you return to your home by 9 o'clock each night, and you also must attend a batterer's intervention program. The program meets each week. I am going to be watching your progress closely. If you fail to attend, if you don't follow the program's rules, if you don't comply with this order in any way, you will find yourself back here answering to me. Is all of this clear?"

Upset, Mr. Chin asks Judge Henderson why he is being ordered to go to a batterer's program. He tells the judge that he is a stable, working man who is innocent of the charges against him, and that he does not need to be monitored. Mr. Chin goes on to say that, since he is not a batterer, he doesn't see how the program will change anything.

Since being appointed to the domestic violence court Judge Henderson has read a number of studies regarding batterer's intervention programs. Some indicate that they are successful in changing the behaviors of abusers; others are less conclusive. Regardless, Judge Henderson knows that sending defendants to batterer's programs enables him to keep tabs on their whereabouts.

Accordingly, Judge Henderson tells Mr. Chin: "I'm not sending you to this program for your benefit—it's for the benefit of Ms. Smith and the people of West Jackson. It doesn't matter to me whether you like it, or what you say there. The point is, you've been charged with a serious crime, and I need to keep an eye on you. While you are awaiting trial, it is my job to make sure I know what you are doing, when, and how. As for your guilt or inno-

cence, you'll have your day in court to present a defense, if you so choose."

Over the next few months, the court monitors Mr. Chin's behavior. Mr. Chin returns to court once every two weeks, where the resource coordinator provides status reports to the court about his compliance with his conditions of release. And, on a few occasions, Judge Henderson calls Mr. Chin at his home, in the evening, to check whether he is obeying the curfew imposed as a condition of his release.

At the end of his third month in the domestic violence court, following a jury trial, Mr. Chin is acquitted of the charges against him.

ILLUSTRATION FOUR

Joseph and Maria Farrell have been married for twenty-five years. After a series of bitter fights, followed by hopeful reconciliations—a pattern which stretched out over most of the past year—Mrs. Farrell decided to leave her husband and seek a divorce. She moved in with her sister, Hannah Cunningham, and told Mr. Farrell that until he heard from her, she wanted no contact with him either in person or by the phone. She explained that she needed to move on with her life, and that she did not want to repeat the terrible arguments they had been having.

Two weeks after their separation, Mr. Farrell went to Ms. Cunningham's home to talk to Mrs. Farrell about reconciling and having her return to their home. Their conversation quickly turned into an argument, growing increasingly heated. Mrs. Farrell, scared by her husband's behavior, closed herself in a bedroom and barricaded the door. Using a large kitchen knife, Mr. Farrell attempted to stab through the door and force his way into the room. The police, who had been called by Mrs. Farrell, arrived before Mr. Farrell was able to enter the bedroom. They disarmed Mr. Farrell and arrested him.

Following his arrest, Mr. Farrell was arraigned at the downtown arraignment court, where he was charged with criminal possession of a weapon and aggravated assault. Mr. Farrell, who had no prior criminal history, was able to post the money bond needed to make bail. Before releasing Mr. Farrell, the arraignment court judge routed the case to Judge Henderson's domestic violence court and imposed a standard order of protection, barring Mr. Farrell from having any contact with his wife. The order would remain in effect until Mr. Farrell appeared before Judge Henderson.

At the first status hearing in Judge Henderson's court, the assistant district attorney tells the judge that the arraignment court's order of protection has expired and asks Judge Henderson for a new order: "Your honor, I'm sure you'll agree, given the potentially life-threatening nature of Mr. Farrell's attack on his wife, that an order of protection barring any contact is essential in this case. Mr. Farrell is accused of committing a terribly violent crime."

Mr. Farrell's attorney, Max McGuire, asks to be heard and informs the court that since the evening of the incident, Mr. and Mrs. Farrell have decided to enroll in marriage counseling sessions with a highly regarded social worker and that they are committed to repairing their marriage. "Your honor, I have spoken to Mrs. Farrell by phone. She has indicated that she wants to pursue these counseling sessions with her husband."

According to Mr. McGuire, the unfortunate incident at Ms. Cunningham's house was a low point for the Farrells which has spurred them to take a fresh look at their problems. "Judge Henderson, given the Farrells' wishes, it would be a mistake for this court to stand in the way of their efforts to preserve their marriage. Under these circumstances, a no-contact order of protection simply makes no sense. In fact, the Farrell's actions—their recent conversations leading to their decision to go to counseling—already have violated the arraignment court's no-contact order. I ask the court to modify the order requested by the assistant district attorney, so that it allows Mr. and Mrs. Farrell to attend marriage counseling sessions and to speak with each other as necessary to arrange these meetings."

Mrs. Farrell is not present in the courtroom. Judge Henderson asks Barbara Taylor, the resource coordinator, whether she has any information regarding Mrs. Farrell's wishes with respect to the counseling sessions. Ms. Taylor tells the judge that she contacted Mrs. Farrell's victim advocate, but, because of the newness of the case, the victim advocate had not yet had an opportunity to speak with Mrs. Farrell. Ms. Taylor is unable to confirm whether Mrs. Farrell has had a change of heart.

Judge Henderson addresses the defendant: "I have heard the arguments made on your behalf by Mr. McGuire. But without being certain of Mrs. Farrell's wishes, I simply cannot allow you to have contact with her. My concern for her safety, given your past actions, is too great. As a result, I am issuing an order of protection prohibiting you from having any contact with your wife. We will schedule another hearing within two weeks to consider again

whether this order should be modified to allow you to go to counseling sessions. Your efforts to save your marriage will have to wait.” Weighing heavily on Judge Henderson’s mind was the belief, based on his experience with these cases, that counseling rarely works when violence is the issue.

Judge Henderson continues: “Mr. Farrell, I want to be very clear about this order of protection. It is my order. You are to have no contact at all with your wife. You cannot see her in person. You cannot talk to her on the phone. If she calls you, you are not to speak with her. If she asks to see you, you are not to meet with her. Do you understand, Mr. Farrell?”

Mr. Farrell tells the judge that he understands. Judge Henderson then asks the assistant district attorney and Mr. McGuire to approach the bench. He schedules a hearing in two weeks and directs Ms. Taylor to work with the victim advocate so that Mrs. Farrell is quickly informed about the order of protection. Back on the record, Judge Henderson ends the hearing, saying, “Ms. Taylor, I want to see a full report from the victim advocate regarding Mrs. Farrell’s wishes before the next status hearing two weeks from now.”

* * *

Since 1987, when the first domestic violence court opened its doors in Quincy, Massachusetts, state courts across the country have begun to rethink the way they handle domestic violence cases, creating specialized domestic violence courts of their own. These experiments have been driven by several forces, including increases in domestic violence cases, judicial frustration with traditional responses, and public pressure. Domestic violence courts are still a new phenomenon; as of yet, no one has taken a comprehensive look at their impacts. Still, preliminary research suggests they are making a difference, reducing dismissal and warrant rates, and providing improved services to victims.

JUST THE (UNWIELDY, HARD TO GATHER, BUT NONETHELESS ESSENTIAL) FACTS, MA'AM: WHAT WE KNOW AND DON'T KNOW ABOUT PROBLEM-SOLVING COURTS

Greg Berman*
and Anne Gulick**

Policymakers often think, incorrectly, that an evaluation is like an “audit” or trial in which the results are usually clear cut and definitive. Either the funds were spent or they weren’t; either the program served its intended beneficiaries at a reasonable cost per client or it didn’t. Such “audit” questions are much easier to answer than the “evaluation” questions of cause and effect, often stretching out over a lifetime of the targets of crime prevention efforts.¹

The expected value of any net impact assessment of any large scale social program is zero.²

INTRODUCTION

Robert Martinson’s seminal 1974 *Public Interest* article, *What Works? Questions and Answers About Prison Reform* offered a

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1. Lawrence W. Sherman, *Thinking About Crime Prevention*, in NAT’L INST. OF JUSTICE, *PREVENTING CRIME WHAT WORKS, WHAT DOESN’T, WHAT’S PROMISING* 2-1, 2-15 (Lawrence W. Sherman et al. eds., 1996) [hereinafter *WHAT WORKS*].

2. Peter H. Rossi, *The Iron Law of Evaluation and Other Metallic Rules*, 4 RES. SOC. PROBS. & PUB. POL’Y 3, 4 (1987).

bleak assessment of rehabilitative initiatives aimed at criminal offenders.³ This literary review of prison-based treatment programs—from vocational training to psychotherapy—concluded that, “[w]ith few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism.”⁴ Martinson determined the failure of treatment programs by demonstrating a failure of research because the more than 200 studies he reviewed gave little evidence that the programs studied were linked to a reduction in crime.⁵ Yet, what seems to have most frustrated the author were the studies themselves, many of which left unclear whether the programs had not worked, or whether the system under which they were administered prevented successful implementation.⁶

Martinson’s hugely influential article cast a pall over rehabilitative criminal justice programs for years. To this day, reformers in the field find themselves grappling with the suspicion—held by many academics, policymakers, and citizens—that “nothing works.” The 1996 report, *Preventing Crime: What Works, What Doesn’t, What’s Promising* confronted this mindset head on:

Merely because a program has not been evaluated properly does not mean that it is failing to achieve its goals. Previous reviews of crime prevention programs, especially in prison rehabilitation, have made that error, with devastating consequences for further funding for those efforts. In addressing the unevaluated programs, we must blame the lack of documented effectiveness squarely on the evaluation process, and not on the programs themselves.⁷

Sherman attempted to infuse hope into the field by throwing out the “nothing works” conclusion.⁸ But the more accurate conclusion he offered in its place—that very little is known about what works⁹—comes with its own set of frustrations.

Problem-solving court research,¹⁰ most of it conducted post-Sherman, faces a political climate that prefers definitive answers

3. See Robert Martinson, *What Works? Questions and Answers about Prison Reform*, 35 PUB. INT. 22 (1974).

4. *Id.* at 25.

5. *Id.*

6. *Id.* at 24.

7. Sherman, *supra* note 1, at 2-21 to 2-22.

8. *Id.* at 2-21.

9. *Id.* (discussing what is unknown about crime prevention programs).

10. For the purposes of this Essay, “problem-solving courts” refers to drug courts, community courts, domestic violence courts, mental health courts, juvenile intervention courts, and family treatment courts. Specialized court initiatives seek to focus the

over cautious preliminary findings, and is still likely to mistake uncertainty for proof of failure. Yet, at present, cautious preliminary findings are the best tools. The research to date on these new judicial experiments does not offer many definitive conclusions. Projects that fall under the “problem-solving” umbrella have been around for a relatively short time—anywhere from a decade to a few months. It takes time and money to track recidivism over the long term, to meaningfully weigh program costs and benefits, and to compare new practices to one another, as well as to business as usual.

The best research designs use a random assignment model, splitting a single pool of defendants between an experimental track and normal case processing, but in most cases this “gold standard” is not feasible for studies of problem-solving courts. Quasi-experimental comparison groups range from the good (defendants in traditional court with carefully matched characteristics to drug court participants), to the not so good (less rigorously selected groups of defendants undergoing normal prosecution), to the bad (defendants who refused to participate in the problem-solving court).

In truth, many programs are not subject to even a bad quasi-experimental evaluation. While the demand for criminal justice research is high, both among policymakers and practitioners, the financial support lags.¹¹ Outside of the National Institute of Justice, there are few sources of funding for criminal justice research.¹²

Nevertheless, problem-solving courts have begun to leave a paper trail. Many problem-solving courts have produced, are producing, or plan to produce process evaluations with detailed information about how the programs have been implemented. Sherman noted that newer programs have the advantage of more rigorous standards for evaluation,¹³ and in the long history of criminal justice innovation, it is indeed difficult to locate many new ideas that have been better documented or more well-researched than problem-solving courts.

What is known about problem-solving courts? After more than a decade of practice, what conclusions, if any, can be drawn about

energies of judges, lawyers, and administrators on solving difficult social, human, and legal problems.

11. Lawrence W. Sherman, *Conclusions: The Effectiveness of Local Crime Prevention Funding*, in *WHAT WORKS*, *supra* note 1, at 10-1, 10-15 to 10-18.

12. *See id.* at 10-16 to 10-18 (noting that neither Congress nor state legislatures have funded evaluations of research programs).

13. *Id.* at 10-20 to 10-21.

these judicial experiments? Where are the gaps in the current knowledge and which areas are ripe for further study? This Essay attempts to answer these questions. It is not a piece of original research, but rather an effort to map the territory of this new field, offering for the first time both a review of current problem-solving research and a sketch of a future agenda.

I. DRUG COURTS

Any review of problem-solving court research must begin with drug treatment courts, the first projects to fall under the problem-solving court umbrella, and the most extensively studied. Since 1989, when the first drug court opened, the model has been replicated widely.¹⁴ There are now hundreds of drug courts in operation or in planning.¹⁵ Moreover, these courts have generated a sizeable body of research on their operations and outcomes. Drug courts now have enough of a track record to promote an informed discussion of how they work, how well they work, and why they work.

A. What We Know

Steven Belenko's reviews of drug court evaluations are the most authoritative source of information on the what, where, and how of drug court research to date.¹⁶ His *Research on Drug Courts: A Critical Review 2001 Update* reviewed thirty-seven evaluations from thirty-six different drug courts and only included studies conducted by outside evaluators.¹⁷ Most of the studies included were process evaluations, but some included limited outcome measures and cost analyses as well.¹⁸ Based on Belenko's review and other drug court studies, the following can be stated about drug court programs:

14. See, e.g., Ctr. for Court Innovation, *Problem-Solving Courts*, at <http://www.problem-solvingcourts.org> (last visited Mar. 15, 2003) (noting that "over the past decade, hundreds of experimental courts have sprung up across the country.").

15. *Id.*

16. STEVEN BELENKO, NAT'L CTR. ON ADDICTION & SUBSTANCE ABUSE AT COLUMBIA UNIV., *RESEARCH ON DRUG COURTS: A CRITICAL REVIEW 2001 UPDATE 1* (2001), available at http://www.casacolumbia.org/usr_doc/researchondrug.pdf (last visited Mar. 15, 2003).

17. *Id.*

18. *Id.* at 9.

1. *Drug Courts are Popular and Serve a Needy Population*

According to Belenko, “[d]rug courts have achieved considerable local support and have provided intensive, long-term treatment services to offenders with long histories of drug use and criminal justice contacts, previous treatment failures, and high rates of health and social problems.”¹⁹

2. *Court-Mandated Treatment Programs Result in Higher Retention Rates*

The estimated national average one-year retention rate for mandatory treatment is sixty percent.²⁰ By way of contrast, reported retention rates for voluntary treatment programs range from thirty to sixty percent over a three-month period (one-year rates not available).²¹

3. *The Longer Participants Stay in Treatment, the Better the Outcomes*

A 1978 study of an Oregon program demonstrated that people who dropped out of treatment were less likely to be rearrested if they had stayed in treatment for at least ninety days.²² This finding pointed to the importance of looking beyond what happens to graduates of drug courts. Outcomes for other participants (even those who “fail” in treatment) can be substantial and are worth studying.

4. *Drug Court Participants had Lower Rates of Recidivism and Drug Use While Still in the Program, than did Comparison Groups Undergoing Normal Prosecution*²³

Lower in-program recidivism rates demonstrated that offenders in drug court pose a reduced risk to public safety, at least during

19. *Id.* at 1.

20. Steven Belenko, *Research on Drug Courts: A Critical Review*, 2 NAT'L DRUG CT. INST. REV. 2, 26-27 (1999), available at <http://www.npcresearch.com> (last visited Mar. 15, 2003).

21. Ward S. Condelli & George DeLeon, *Fixed and Dynamic Predictors of Client Retention in Therapeutic Communities*, 10 J. SUBSTANCE ABUSE TREATMENT 1, 11-16 (1993).

22. Sherry Holland, *Gateway Houses: Effectiveness of Treatment on Criminal Behavior*, 13 INT'L J. ADDICTIONS 369, 371-72, 374 (1978).

23. Belenko, *supra* note 20, at 26-37.

the multi-year period when they are under drug court supervision.²⁴

5. *Even Absent Treatment, Graduated Sanctions Can Have a Statistically Significant Impact on Offenders' Behavior*

An Urban Institute study of the District of Columbia Superior Court suggested that ongoing monitoring and graduated sanctions and rewards could help drug offenders avoid rearrest in the year after sentencing, even if offenders were not linked to treatment.²⁵ The results point to the value of intensive judicial monitoring.²⁶

6. *The Certainty and Severity of Drug Court Sanctions Are Crucial to the Model's Effectiveness*

Criminal justice researchers looked at the effects of punishment in terms of certainty (whether the sanction will be enforced), severity (how harsh the sanction will be), and celerity (how quickly the sanction will be imposed).²⁷ One recent study surveyed college students about the likelihood that they would drive home from a party drunk, given the possibility of being caught and punished for the crime.²⁸ Respondents showed less concern for how quickly the punishment would come, and more concern with its certainty and severity in deciding whether to commit the crime.²⁹ Extralegal consequences were also important factors, but the study's most prominent conclusion was the weakness of a punishment's celerity as a deterrent.³⁰ Another study by Adele Harrell of the Urban Institute compared the graduated sanctions programs in three drug

24. See *id.* at 37 (noting that criminal activity is reduced in the drug court programs).

25. ADELE HARRELL ET AL., URBAN INST., FINDINGS FROM THE EVALUATION OF THE D.C. SUPERIOR COURT DRUG INTERVENTION PROGRAM 53-62 (1998), available at http://www.urban.org/uploadedPDF/409041_findings.pdf (last visited Mar. 15, 2003).

26. See *id.* at 47-67.

27. See Daniel S. Nagin & Greg Pogarsky, *Integrating Celerity Impulsivity and Extralegal Sanction Threats into a Model of General Deterrence: Theory and Evidence*, 39 CRIMINOLOGY 1, 3 (2000), available at <http://www.ssc.wisc.edu/econ/Durlauf/networkweb1/London/Criminology1-15-01.pdf> (last visited Mar. 15, 2003).

28. *Id.*

29. *Id.* at 24 (reporting that coefficients for probability and severity are negative and statistically significant).

30. *Id.* at 25 (stating that the deterrent impact of extra legal consequences is at least as great as that for legal consequences).

treatment court settings, and found that the severity of the sanctions had the greatest effect across the board.³¹

7. *Well-Designed Post-Program Studies About the Recidivism of Drug Court Clients are Relatively Sparse*

Of the more than three-dozen evaluations included in Belenko's latest review, only six looked at post-program recidivism rates.³² Of these, two showed a statistically significant reduction in recidivism.³³ Clearly, there is a need for more information in this area.

8. *Cost Analyses Revealed Cost Savings for Drug Courts Compared to Traditional Adjudication*

Nearly all studies showed significant savings to the criminal justice system when drug courts were implemented. For example, a Multnomah County, Oregon study reported that for every dollar spent on drug court treatment and program administration, the system saved two dollars and fifty cents in avoiding the costs of conventional adjudication.³⁴ This figure excluded costs related to victimization, theft reduction, public assistance, and medical claims.³⁵ When those costs were added in, the savings were ten dollars for every one dollar spent.³⁶

9. *Cost Savings for Jail and Prison Beds are Less Clear*

A 2000 Vera Institute of Justice report cited the need to look at multiple factors in evaluating a drug court's impacts on jail and prison costs.³⁷ While faster case processing and reduced recidivism among program graduates may lower these costs, other factors may offset these savings.³⁸ For example, costs accrue when judges use jail time as a sanction for participants who slip up. The authors also questioned whether some drug court participants would have

31. Adele Harrell & John Roman, *Reducing Drug Use and Crime Among Offenders: The Impact of Graduated Sanctions*, 31 J. DRUG ISSUES 1 (2001).

32. BELENKO, *supra* note 16, at 33.

33. *Id.*

34. MICHAEL W. FINIGAN, N.W. PROF'L CONSORTIUM, AN OUTCOME PROGRAM EVALUATION OF THE MULTNOMAH COUNTY S.T.O.P. DRUG DIVERSION PROGRAM 36 (1998).

35. *Id.*

36. *Id.*

37. REGINALD FLUELLEN & JENNIFER TRONE, VERA INST. OF JUSTICE, DO DRUG COURTS SAVE JAIL AND PRISON BEDS? 1-2 (2000), available at http://www.vera.org/publication_pdf/drugcourts.pdf (last visited Mar. 15, 2003).

38. *See id.* at 2.

been incarcerated had they undergone traditional adjudication.³⁹ The report concluded that “[w]e simply do not know enough about the interaction of these elements to accurately predict overall bed savings.”⁴⁰

B. Unanswered Questions

Even with the relatively extensive body of drug court research, there are a lot of unanswered questions. Variations in research quality and program design make it difficult to draw general conclusions about the drug court model. Recidivism rates among program participants as compared with those undergoing normal prosecution, arguably the most important measure of a drug treatment court’s success, are still mostly unknown. Post-program studies are few and far between, and relatively little funding is in place for this kind of research. Many of the studies that do exist fail to distinguish between recidivism during and after program participation.

Post-program effects, other than recidivism, have received even less attention. Belenko cited the need for information on participants’ future drug use, employment, family stability, and use of social services, pointing to the benefits of tracking the work of drug courts and the progress of their participants over a substantial period of time.⁴¹ One-shot evaluations, Belenko noted, were far less useful than multi-year analyses, since impacts may fluctuate, particularly in a program’s first years of operation.⁴²

Studies also frequently fail to track the progress and failure of defendants who do not graduate from drug court programs, but instead drop out early. Drug court graduates will almost always have lower recidivism than drug court failures and comparison group defendants.⁴³ The proper comparison, however, is of all drug court participants with comparison group defendants. Tracking drug court failures is important not simply for the sake of a thorough comparison, because we know that treatment can benefit even those participants who do not complete their entire regimen. The fate of less successful defendants, however, might shed light on the effectiveness of some of the program’s components.

39. *Id.* at 4.

40. *Id.* at 6.

41. BELENKO, *supra* note 16, at 54-55.

42. *Id.* at 55.

43. *See id.* at 56.

C. New Types of Drug Courts

More research is also needed to assess the efficacy of adaptations of the drug court model. The two most prominent adaptations are family treatment courts and mental health courts, which apply drug court principles to cases involving addicted parents charged with child neglect, and cases involving defendants with chronic persistent mental illness.

A 1999 Urban Institute evaluation of the implementation of three family treatment courts cited many of the challenges particular to this emerging model (client confidentiality, juggling the rights of the parent and the welfare of the child, the use of sanctions, and extensive service needs).⁴⁴ A future research agenda for family treatment courts emerges out of the lessons learned from implementation. These authors felt that the focus should be on detailed process evaluations that document parents' and children's service needs, outcomes, both immediate and long-term, for parents and children,⁴⁵ system impacts for courts and other agencies,⁴⁶ and the direct expenditures and the value of contributions required to operate these model projects.⁴⁷ Any effort to seriously evaluate

44. ADELE HARRELL & ALICE GOODMAN, URBAN INST., REVIEW OF SPECIALIZED FAMILY DRUG COURTS: KEY ISSUES IN HANDLING CHILD ABUSE AND NEGLECT CASES 2 (1999), available at <http://www.urban.org/uploadedPDF/specilzd.pdf> (last visited Mar. 15, 2003).

45. *Id.* at 36.

Immediate outcomes [for children] include the duration and number of foster care episodes while the case is before the court and the final placement (parents, in kinship foster care, and in foster care). Longer-term outcomes for those placed with their parents include the percentage named in subsequent abuse or neglect petitions, and, for those in which parental rights were terminated, the percentage adopted. Immediate outcomes [for parents] include treatment graduation/failure, substance abuse and participation in aftercare following case termination, perceptions of fairness of court process, effects of process on treatment motivation and retention, and assessment of the relationship between FDC services and reductions in problems faced by parents.

Id.

46. *Id.* at 36-37.

System impacts. For courts, these include; the duration of cases, the number of hearings; the demands for staff, courtroom space, and other resources; the net widening effects of encouraging early intervention; the potential efficiencies of combining multiple petitions for multiple children in a family in a single case; and the potential for linking of cases active in different courts or dockets. For other agencies, these include the impact on demand for staff and services, the requirements to change procedures, and the barriers to participation based on agency mandates or funders.

Id.

47. *Id.* at 37.

family treatment courts will run up against a number of obstacles, including the need to track multiple parties (parents and children) and serious confidentiality restrictions.⁴⁸

Mental health courts pose a somewhat different set of challenges. They require an individualized approach to defining success for participants, each of whom must receive a treatment regimen, and graduation requirements based on her unique affliction.⁴⁹ For this reason, outcome measures are difficult to standardize even within a single court. As John S. Goldkamp and Cheryl Irons-Guyun of the Crime and Justice Research Institute wrote in their 2000 review, “[c]ourts cannot say, ‘be cured within 12 months.’”⁵⁰ Research must take this reality into account.

It is too soon to examine recidivism rates for mental health courts, but self-reported data on retention and jail savings has begun to surface. For example, the Seattle Municipal Court’s Mental Health Court reported that more than two-thirds of all participants continued to be successfully engaged in treatment at the end of their first year.⁵¹ The Santa Clara County (CA) Mental Health Court Progress Report assessed the total cost savings to the county in unserved jail days of moving fifty-six clients from jail custody to community treatment at sixty-five dollars and eighty cents per client, per day.⁵² Moreover, advocates marshaled significant anecdotal evidence to support the notion that mental health courts offered more resources and a more sensitive approach to the needs of mentally ill defendants than did conventional case processing.⁵³

While these findings are interesting, this question remains—how do you define success in a mental health court? As the programs develop, there will be significant pressure to demonstrate reduced recidivism, a goal that may not be realistic for many participants. What other measures are there? Improved functionality and qual-

48. *Id.*

49. JOHN S. GOLDKAMP & CHERYL IRON-GUYN, CRIMINAL & JUSTICE RESEARCH INST., EMERGING JUDICIAL STRATEGIES FOR THE MENTALLY ILL IN THE CRIMINAL CASELOAD: MENTAL HEALTH COURTS IN FORT LAUDERDALE, SEATTLE, SAN BERNARDINO, AND ANCHORAGE 74 (2000), *available at* <http://www.ncjrs.org/pdffiles1/bja/182504.pdf> (last visited Mar. 15, 2003).

50. *Id.*

51. See Eric Trupin et al., City of Seattle, Mental Health Court: Evaluation Report 48 (2001), *available at* <http://www.cityofseattle.net/courts/pdf/mhreport.pdf> (last visited Mar. 15, 2003).

52. SUPERIOR COURT OF CAL., SANTA CLARA COUNTY, MENTAL HEALTH COURT PROGRESS REPORT 7 (2001).

53. See generally GOLDKAMP & IRON-GUYN, *supra* note 49, at 9-57 (discussing mental health courts in Fort Lauderdale, Seattle, San Bernardino, and Anchorage).

ity of life? Cost savings? A reduction in the frequency of arrests? Given the difficult population the courts work with, mental health courts may want to make a deeper investment in qualitative research by conducting interviews with participants and their family members to assess both their functionality and their satisfaction with the process.

II. COMMUNITY COURTS

Each community court is more or less a model unto itself, designed to address quality-of-life problems within a specific neighborhood or group of neighborhoods.⁵⁴ Among the nearly two dozen community courts currently in operation there is wide variety in the types of cases each court tackles—prostitution, landlord-tenant disputes, truancy, public urination, and unlicensed street vending, to name a few.⁵⁵ Community courts seek to have an effect on both individual litigants and on the community as a whole.⁵⁶ A community's quality of life, however, is a much more complicated outcome to measure than, for instance, drug treatment retention rates. Benefits to neighborhood residents range from the concrete (less graffiti), to the intangible (how safe people feel, and how people relate to each other and their physical space).⁵⁷ Therefore, factors to take into account when evaluating the effectiveness of a community court project might include the neighborhood's perception of the court, its staff, and its mission, the impact on local hot spots and eyesores, and the way government and citizens relate to one another.⁵⁸ Community courts thus call for a research agenda that goes beyond counting cases and tracking dispositions. Surveys, ethnographies, interviews, and other narrative records are essential to a critical examination of whether these programs work.

54. See MICHELE SVIRIDOFF ET AL., CTR. FOR COURT INNOVATION, DISPENSING JUSTICE LOCALLY: THE IMPLEMENTATION AND EFFECTS OF THE MIDTOWN COMMUNITY COURT 3 (2000), available at http://www.courtinnovation.org/pdf/disp_just_loc.pdf (last visited Mar. 15, 2003).

55. MICHELE SVIRIDOFF ET AL., DISPENSING JUSTICE LOCALLY: THE IMPACTS, COST AND BENEFITS OF THE MIDTOWN COMMUNITY COURT 5 (2001), available at http://www.ncsconline.org/WC/Publications/Res_CtComm_MidtownExecSumPub.pdf (last visited Mar. 15, 2003).

56. SVIRIDOFF ET AL., *supra* note 54, at 2.

57. *See id.* at 7.

58. *See SVIRIDOFF ET AL.*, *supra* note 55, at 5 (noting that these factors were considered when evaluating the Midtown Community Court).

A. Midtown Community Court

The most thorough community court study to date is the National Center for State Courts' evaluation of the Midtown Community Court in Manhattan, which was conducted in two stages. The first, completed in 1997, included a process analysis and preliminary impact measures.⁵⁹ The second, in 2001, evaluated the long-term impacts of the court over three years and included a cost-benefit analysis.⁶⁰

The first stage of research documented the following:

1. *Case Outcomes*

One of the threshold questions for the Midtown Community Court was whether the court could change outcomes in cases involving misdemeanor and quality-of-life crimes (prostitution, shoplifting, illegal street vending, low-level drugs). During the period studied, quality-of-life offenders who went through conventional case processing in Manhattan tended to receive either jail or no sanctions at all from the criminal justice system.⁶¹ Offenders received a larger amount of intermediate sanctions, like community service or a social service referral, in Midtown than in the downtown court.⁶²

2. *Community Service Compliance Rates*

Midtown achieved a seventy-five percent compliance rate in contrast with fifty percent in the downtown sample.⁶³ Midtown also tracked defendant characteristics in tandem with compliance rates and found that the faster offenders were assigned their service, the more likely they were to comply.⁶⁴

3. *Reduced Crime*

The first evaluation of Midtown included an ethnography designed to provide insight into the daily lives of street offenders, to elicit their opinion about the court, and to examine how the street scene had changed in the neighborhood since the court's opening.⁶⁵ Prostitution arrests dropped fifty-six percent in Midtown during

59. SVIRIDOFF ET AL., *supra* note 54, at 1.

60. SVIRIDOFF ET AL., *supra* note 55, at 2.

61. SVIRIDOFF ET AL., *supra* note 54, at 6.

62. *Id.*

63. *Id.* at 7.

64. *Id.*

65. *Id.*

the court's first eighteen months of operation.⁶⁶ Unlicensed vending arrests dropped twenty-four percent.⁶⁷ Ethnographic data suggested that the court was responsible for increased pressure, and a subsequent drop in local activity.⁶⁸ In both industries, sex workers and vendors complained about the inconvenience of frequent court appearances and community service sanctions, and some reported exploring other ways to make a living as a result.⁶⁹

4. *Community Attitudes*

Focus group research revealed that in the months following the court's opening, the police department moved from skepticism to support for Midtown.⁷⁰ Community members expressed positive, but less dramatic, feedback in the first phase of the evaluation.⁷¹

The second stage of the National Center for State Courts' evaluation of Midtown unearthed some of the complexities of measuring long-term success of a community court. The court opened during a period of dramatic neighborhood turnaround for midtown Manhattan. Many factors contributed to the positive changes, including the improved local economy and the Giuliani administration's concerted effort to clean up the Times Square area. The Midtown Community Court undoubtedly played a role in the transformation, but it is not possible to accurately apportion the credit.⁷²

The second stage of the evaluation also demonstrated that fewer Midtown offenders were initially sentenced to jail.⁷³ Unlike conventional criminal courts, Midtown has rigorously monitored the compliance of offenders with community and social service sentences.⁷⁴ Offenders who did not comply were often sentenced to jail when they reappeared in court.⁷⁵ In other words, Midtown used jail less frequently than other Manhattan courts hearing comparable cases, but when offenders were sentenced to jail, it was for longer periods because they had already been given a chance to

66. *Id.*

67. *Id.*

68. *Id.* at 7-8.

69. *Id.*

70. *Id.* at 8.

71. *Id.*

72. *See id.*

73. *Id.* at 6.

74. *Id.* at 9.

75. *Id.* at 6.

fulfill intermediate sanctions.⁷⁶ This use of jail as a “secondary” sanction in response to non-compliance led to a reduction in the net jail savings generated by Midtown.⁷⁷ The evaluators concluded: “[a]fter accounting for the greater use of secondary jail at the Midtown Court, the net jail saving of the project over three years was reduced to roughly 12,600 jail days—or approximately thirty-five jail years.”⁷⁸

Finally, as part of a cost-benefit analysis, researchers made use of a neighborhood survey, which revealed that two-thirds of residents would be willing to pay more taxes to keep the court in operation.⁷⁹ “Overall, the survey demonstrated that local respondents saw the benefits of the Midtown Court as equal to or greater than its costs and supported public funding for comparable projects.”⁸⁰

B. Future Research

Needless to say, it is impossible to draw any firm conclusions about community courts based on the results of a single study, no matter how encouraging. In the days ahead, society’s understanding of community courts will undoubtedly become much richer. Each community court in operation is documenting its own impacts. Two research projects are particularly worth watching. Taken together, they demonstrate the multifaceted approaches that research in this field must take in order to capture a full picture of a community court’s outcomes. The first is the Columbia University Center for Violence Research and Prevention’s study of the Red Hook Community Justice Center in Brooklyn. Red Hook departs significantly from the Midtown model. The court is multi-jurisdictional and serves a diverse set of neighborhoods.⁸¹ Offenders tend to live within the community, as opposed to Midtown, where most serious offenders do not.⁸² The primary neighborhood demonstrates less social organization, and its demographics are entirely different (public housing tenants, as opposed to a mixture of

76. *See id.*

77. *Id.*

78. SVIRIDOFF ET AL., *supra* note 55, at 6-7.

79. *Id.* at 10.

80. *Id.*

81. GREG BERMAN, CTR. FOR COURT INNOVATION, RED HOOK DIARY: PLANNING A COMMUNITY COURT 3 (2001), available at http://www.courtinnovation.org/pdf/redhook_diary.pdf (last visited Mar. 15, 2003).

82. *See id.* (noting the residents’ need for judicial services); *see also* DAVID C. ANDERSON, IN NEW YORK CITY, A “COMMUNITY COURT” AND A NEW LEGAL CULTURE 5 (1996), available at <http://www.ncjrs.org/pdffiles/commcrt.pdf> (last visited Mar. 15, 2003).

middle-class residents and businesses).⁸³ The current evaluation will focus on qualitative measurements of community improvements and perceptions of procedural justice, and look for results in the form of enhanced community involvement and support.⁸⁴ Key research questions include the following: To what extent does the Justice Center bring a new approach to case processing, the roles of court personnel, and the disposition of cases? How does local knowledge and information sharing affect the business of the court? How are community members involved in the Justice Center, and how does the Justice Center get involved with the community?

A second study of note is underway in Hartford, Connecticut. Since opening in 1998, the Hartford Community Court differs from Midtown most sharply in terms of its target population. The court serves all of Hartford's seventeen downtown neighborhoods (though the total number of residents is still smaller than the number in Midtown's jurisdiction).⁸⁵ Hartford has developed a process evaluation to document nine key elements of the court: target problems, target locations, target populations, court processing focus and adaptations, identifying, screening, and enrolling participants, dispositional options and the structure and content of services, community involvement, productivity (services delivered and impact per resource), and extent of systemwide support and participation.⁸⁶ The evaluation strategy, similar to Midtown's, is a two-tiered initial study of implementation and immediate outcomes.⁸⁷

III. DOMESTIC VIOLENCE COURTS

The primary stated objective of most domestic violence courts is the enhancement of victim safety.⁸⁸ Other outcome measures include reduced recidivism, improved monitoring and accountability for defendants, improved case processing speed and systemization,

83. ANDERSON, *supra* note 82, at 5; BERMAN, *supra* note 81, at 2.

84. COMM. JUSTICE EXCH., COMMUNITY SURVEY: BROOKLYN, NEW YORK, at <http://www.communityjustice.org/frameset.asp?heading=best%5Fpractices%5F1> (last visited Mar. 15, 2003).

85. JOHN S. GOLDKAMP ET AL., CRIME & JUSTICE RESEARCH INST., DEVELOPING AN EVALUATION PLAN FOR COMMUNITY COURTS: ASSESSING THE HARTFORD COMMUNITY COURT MODEL 11 (2001).

86. *Id.* at 9.

87. *Id.* at 42.

88. See Kerry Healey et al., *Batterer Intervention: Program Approaches and Criminal Justice Strategies*, ISSUES & PRACS. CRIM. JUST., Feb. 1998, at xii, available at <http://www.ncjrs.org/pdffiles/168638.pdf> (last visited Mar. 15, 2003).

and better coordination among all the players in domestic violence cases.

As domestic violence courts have only begun to yield published evaluations, most of what we know about the model's outcomes derives from studies of its core components, particularly batterer intervention programs, judicial monitoring and orders of protection, within the context of regular criminal court.

A. Batterers Intervention Programs ("BIP")

Intervention programs, usually "re-education" programs that give an overview of the history and context of domestic violence, are widely used in conventional criminal courts as a sanction for batterers. Recent research estimates that nearly eighty percent of individuals in batterer programs were sent by probation officers or the courts.⁸⁹ In some cases, as in Florida, state law requires program participation of all domestic violence defendants. Batterer intervention is popular, but how well does it work? An August 2001 literature review conducted by Larry W. Bennett and Oliver J. Williams cited three measures for a program's success: "(1) Are batterers held accountable for their crime (or, has justice been served?) (2) Are victims safe? And, (3) Has the batterer changed his attitudes and behavior?"⁹⁰ The authors reached two conclusions: "(1) Batterers [sic] programs as currently configured have modest but positive effects on violence prevention, and (2) there is little evidence at present supporting the effectiveness of one BIP approach over another."⁹¹

To date, few studies address the relative effectiveness of different types of batterer programs (the Deluth "re-education" model has dominated the field in the past, but now faces competition from other emerging models). Thankfully, there is significant interest within the research community in this area. As a result, the next few years may yield much more information on how different program models compare with one another. Bennett and Williams cited a number of questions for comparative study, including the following: What roles do program structure and length play in ef-

89. *Id.* at 1.

90. LARRY W. BENNETT & OLIVER J. WILLIAMS, *CONTROVERSIES AND RECENT STUDIES OF BATTERER INTERVENTION PROGRAM EFFECTIVENESS* (2001), at http://www.vawnet.org/VNL/library/general/AR_bip.html (last visited Mar. 15, 2003).

91. *Id.* These findings concur with a 1999 BIP literature review authored by Robert C. Davis & Bruce G. Taylor, *Does Batter Treatment Reduce Violence? A Synthesis of the Literature*, in *WOMEN AND DOMESTIC VIOLENCE: AN INTERDISCIPLINARY APPROACH* 69, 72, 82-83 (Lynette Feder ed., 1999).

fectiveness? How do programs that adopt an integrated approach to other issues—such as drug abuse and mental health—fare in comparison to more narrowly defined programs? And what about cultural specificity?⁹² Three studies suggested that African-American men who participated in batterers intervention programs experienced higher rearrest and reoffending rates, lower rates of program completion, and lower levels of “trust, comfort, willingness to discuss critical subjects, and participation in treatment.”⁹³

B. Judicial Monitoring

Evidence suggests that rigorous court monitoring may have more of an effect on recidivism than do batterer reeducation programs. Most telling in this regard is a recent random assignment experiment in Brooklyn, which compared offenders assigned to community service to those linked to batterers’ intervention.⁹⁴ There were three experimental groups: one community service track, one twenty-six week batterers’ intervention program track, and one eight week program track (while the length of the programs was considerably different, the total number of hours was the same).⁹⁵ Perhaps predictably, more participants successfully completed the eight week program than the twenty-six week program.⁹⁶ Only participants in the twenty-six week program exhibited lower violence rates than those of the community service group.⁹⁷ Neither program track group provided evidence that participants had learned anything as a result of their treatment, but the ones least likely to reabuse were those who were under court supervision for the longest period of time.⁹⁸ In other words, judicial monitoring, not batterers’ intervention, seems to have made the difference in victim safety.

Two other studies are worthy of note here. In 2000, San Diego court administrators conducted an internal study that underlined the importance of judicial monitoring by showing that highest rates

92. BENNETT & WILLIAMS, *supra* note 90.

93. *Id.*; see Rhea Almeida & Ken Dolan-Delvecchio, *Addressing Culture in Batterers Intervention: The Asian Indian Community as an Illustrative Example*, 5 VIOLENCE AGAINST WOMEN 654, 654 (1999) (discussing Somerset, New Jersey’s Cultural Context Model for a batterers’ intervention program).

94. ROBERT C. DAVIS ET AL., DOES BATTERER TREATMENT REDUCE VIOLENCE? A RANDOMIZED EXPERIMENT IN BROOKLYN—EXECUTIVE SUMMARY INCLUDED (2000).

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

of recidivism in domestic violence cases took place between the time of arrest and the time of a case's disposition.⁹⁹ In the first year, with only a batterers' program in place, recidivism was at twenty-one percent.¹⁰⁰ The next year, when the court added a judicial monitoring component, recidivism dropped to fourteen percent.¹⁰¹

A 1997 study of two projects in Milwaukee examined the effects of two changes in the court system with respect to domestic violence cases—the establishment of a specialized court, and a change in the district attorney's screening policy that increased the pool of cases to include uncooperative victims.¹⁰² The creation of the specialized court resulted in a fifty percent reduction in case processing time, a twenty-five percent increase in convictions, and a decline in pretrial crime.¹⁰³ The change in prosecutorial policy detracted from some of these positive effects, causing a case backlog, a decline in convictions, an increase in pretrial crime, and lower levels of victim satisfaction.¹⁰⁴ Researchers found that shortening court processing time in domestic violence cases was a good idea, introducing domestic violence cases with reluctant victims into the criminal justice system should be carefully considered and undertaken only with sufficient resources for prosecution and adjudication, and in deciding whether or not to prosecute, the victim's voice should be taken into account.¹⁰⁵

C. Orders of Protection

Do orders of protection keep victims safer? Research suggests that the answer is no. A 1996 study by Adele Harrell and Barbara E. Smith pointed to some of the limitations of restraining orders.¹⁰⁶ Findings were based on interviews of female complainants and the

99. WAYNE L. PETERSON & STEPHEN THUMBERG, STATE JUSTICE INST., EVALUATION REPORT FOR THE SAN DIEGO COUNTY DOMESTIC VIOLENCE COURTS 26 (2000).

100. *Id.* at 27.

101. *Id.*

102. Robert C. Davis et al., *Prosecuting Domestic Violence Cases with Reluctant Victims: Assessing Two Novel Approaches in Milwaukee*, in LEGAL INTERVENTIONS IN FAMILY VIOLENCE: RESEARCH FINDINGS AND POLICY IMPLICATIONS 71, 71 (Am. Bar Ass'n ed., 1998) [hereinafter LEGAL IMPLICATIONS], available at <http://www.ncjrs.org/pdffiles/171666.pdf> (last visited Mar. 15, 2003).

103. *Id.*

104. *Id.*

105. *Id.* at 71-72.

106. Adele Harrell & Barbara E. Smith, *Effects of Restraining Orders on Domestic Violence Victims*, in DO ARRESTS AND RESTRAINING ORDERS WORK? 214, 238-41 (Eve S. Buzawa & Carl G. Buzawa eds., 1996).

men named in their orders, as well as court and police records.¹⁰⁷ The researchers found that women who sought orders of protection reported serious incidents of abuse (severe violence, including punching, choking, forced sex, and threats on their lives).¹⁰⁸ Harrell and Smith concluded that the orders were generally not sought “as a form of early intervention, but rather as a signal of desperation following extensive problems.”¹⁰⁹

Unfortunately, permanent orders of protection made no difference in the likelihood that victims would experience physical abuse in the future, nor did they reduce the probability of contact between the victim and the abuser.¹¹⁰ Permanent orders of protection were effective in significantly reducing psychological abuse, and victims generally agreed that it was worthwhile to file the order—even if they still had concerns about their safety.¹¹¹ Harrell and Smith concluded their report by recommending that courts tailor orders of protection to the needs of individual victims, coordinate with other criminal justice agencies to improve enforcement, help victims develop a safety plan, and encourage women to return to court to report future violations.¹¹²

Harrell and Smith’s findings were echoed by a 1997 study by Susan Keilitz, Paula Hannaford, and Hillery S. Efkenman that reviewed the effectiveness of civil protection orders.¹¹³ This report also highlighted the need for courts to link victims to additional services, specifically citing the need for victim counseling and safety planning, the need for the court to address petitioners’ specific concerns, and the need for more detailed knowledge of alleged abusers’ histories of crime and substance abuse.¹¹⁴

D. The Role of Victims

A recent study of a specialized domestic violence court in Toronto revealed that a case was seven times more likely to be prosecuted if the victim was perceived as cooperative, even in a court

107. *Id.* at 214-15.

108. *Id.* at 216.

109. *Id.* at 231.

110. *Id.* at 232-33.

111. *Id.* at 240.

112. *Id.* at 241.

113. SUSAN KEILITZ ET AL., NAT’L CTR. FOR STATE COURTS, CIVIL PROTECTION ORDERS: THE BENEFITS AND LIMITATIONS FOR VICTIMS OF DOMESTIC VIOLENCE 3 (1997).

114. *Id.*

specifically designed to minimize reliance on victim cooperation.¹¹⁵ How do the roles that victims play in their own cases influence the ways in which domestic violence courts work to ensure victim security? What effects do victim advocacy, prosecutorial policies, and other court procedures have on outcomes for victims?

The role of victims in case processing is a topic that has generated significant interest among domestic violence researchers. For example, a 1993 Indianapolis Domestic Violence Prosecution Experiment examined a number of different prosecutorial policies designed to reduce repeat incidents abuse among misdemeanor domestic violence defendants.¹¹⁶ In the six months following case settlement, regardless of prosecutorial policy, researchers found significant rates of battery.¹¹⁷ The victims in the greatest jeopardy of renewed violence were those who dropped charges after the batterer was summoned to court.¹¹⁸ The researchers concluded that “[p]rosecutors can help victims minimize the chance of violence by affirming the legitimacy of their criminal complaints and by respecting their decisions about what is best under their unique circumstances, even if contrary to the prosecutor’s administrative concerns.”¹¹⁹

Other research qualified the above findings by indicating that mandatory arrest policies result in a net reduction in domestic violence offenses, regardless of how the victim participates in the process.¹²⁰ Victim cooperation is not the only variable in domestic violence case outcomes, but its importance should not be overlooked.

Taking the needs of victims into account and studying impacts on victim safety presents some distinct challenges for domestic violence court researchers. Police and court records may not indicate how much abuse has actually occurred, and victims—if they are involved in the court process at all—are often reluctant to participate in formal studies.

115. Myrna Dawson & Ronit Dinovitzer, *Victim Cooperation and the Prosecution of Domestic Violence in a Specialized Court*, 18 JUST. Q. 593, 593 (2001).

116. David A. Ford & Mary Jean Regoli, *Selected Findings and Implications Drawn From The Indianapolis Domestic Violence Prosecution Experiment*, in LEGAL INTERVENTIONS, *supra* note 102, at 62.

117. *Id.*

118. *Id.* at 63.

119. *Id.*

120. See Christopher D. Maxwell et al., *The Effects of Arrest on Intimate Partner Violence: New Evidence from the Spouse Assault Replication Program*, NAT’L INSTS. JUST. RES. IN BRIEF, July 2001, available at <http://www.ncjrs.org/pdffiles1/nij/188199.pdf> (last visited Mar. 15, 2003).

Most research to date on specialized domestic violence courts takes the form of process evaluations, not experimental designs. Preliminary findings from an Urban Institute study of the Brooklyn Felony Domestic Violence Court, for example, point to some significant outcomes.¹²¹ The study reveals improved coordination among stakeholders both inside and outside the court system. Lawyers, judges, and representatives from victims' services and batterers' programs started meeting together for the first time under the new specialized court structure.¹²² Victim advocates were assigned to one hundred percent of victims who came through the court, up from fifty-five percent under the old system.¹²³ Among defendants released on bail, forty-four percent were sent to batterers' programs (up from zero) and five percent were sent to substance abuse treatment (up from two percent).¹²⁴ An additional four percent were mandated to both batterers' programs and substance abuse treatment.¹²⁵ Before the specialized court opened, seventy-three percent of domestic violence felony defendants entered a guilty plea.¹²⁶ After, eighty-eight percent entered guilty pleas.¹²⁷

A pending experiment in the Bronx, conducted by the Center for Court Innovation with funding from the National Institute of Justice, seeks to explore the relative effectiveness of court monitoring and batterers' intervention as responses to domestic violence.¹²⁸ Convicted batterers in the Bronx will be divided at random into four, 200-person test groups.¹²⁹ One group will participate in a batterers' intervention program and receive monthly monitoring, a second group will participate in a batterers' program and receive court monitoring on a graduated schedule, a third group will not participate in a batterers' program and receive monthly monitor-

121. See LISA NEWMARK ET AL., URBAN INST., SPECIALIZED FELONY DOMESTIC VIOLENCE COURTS: LESSONS ON IMPLEMENTATION AND IMPACTS FROM THE KINGS COUNTY EXPERIENCE (2001), available at http://www.urban.org/uploadedPDF/410381_domviolcourts.pdf (last visited Mar. 15, 2003).

122. *Id.* at 17-19.

123. *Id.* at 19-20.

124. *Id.* at 56, 60.

125. *Id.* at 60.

126. *Id.*

127. *Id.*

128. National Institute of Justice, Current NIJ Grants, Testing the Impact of Court Monitoring and Battering Intervention Programs at the Bronx Misdemeanor Domestic Violence Court (Grantees Fund for the City of New York & Center for Court Innovation), at http://www.ojp.usdoj.gov/nij/vawprog/grnt_2001_09.html (last visited Mar. 15, 2003).

129. *Id.*

ing, and a fourth group will not participate in a batterers' program and receive graduated monitoring.¹³⁰ This study, scheduled to conclude in 2004, presents an opportunity to simultaneously test two components of the specialized court model, both batterers' programs and court monitoring, under experimental conditions and within the context of the specialized court itself.

IV. PERCEPTIONS OF PROBLEM-SOLVING COURTS

While problem-solving courts are designed to improve case processing and court outcomes, they also seek to make an impact in the world of public opinion. How are these courts perceived by relevant stakeholders? Do they have the potential to improve public confidence in justice? How about the job satisfaction levels of judges and attorneys?

Recent surveys conducted by the National Center for State Courts have attempted to document public attitudes toward problem-solving courts.¹³¹ These surveys have demonstrated that the public shares problem-solving court innovators' concerns about court efficiency, fairness, and responsiveness to communities.¹³² The research also indicated high levels of public support for problem-solving methods aimed at improvements in these areas.¹³³ A 2001 survey found strong support, particularly among African-American and Latino respondents, for common problem-solving strategies, including the hiring of treatment staff and social workers, bringing offenders back to court to report on their progress in treatment, coordinating the work of local treatment agencies to help offenders, and bringing in relevant outside experts to help courts make more informed decisions.¹³⁴

What do judges think of problem-solving courts? A recent study of state court judges commissioned by the Center for Court Innovation and conducted by the University of Maryland's Survey Research Center suggested that the judiciary shares the public's

130. *Id.*

131. David B. Rottman, *On-Line Court Reform: Can Technology Boost Public Confidence in the Courts?*, JUDGELINK, at <http://judgeline.org/insights/1999/reform> (last visited Mar. 15, 2003).

132. *Id.*

133. DAVID B. ROTTMAN & RANDALL M. HANSEN, *HOW RECENT COURT USERS VIEW THE STATE COURTS: PERCEPTIONS OF AFRICAN-AMERICANS, LATINOS, AND WHITES* 18 (2001).

134. *Id.* at 13-14.

endorsement of basic problem-solving tools.¹³⁵ More than 500 criminal court judges were surveyed.¹³⁶ Participants supported treatment as an alternative to incarceration for addicted, nonviolent offenders (over seventy percent agreed that treatment was more effective than jail).¹³⁷ They overwhelmingly agreed that the bench should be involved in reducing drug abuse among defendants (ninety-one percent).¹³⁸ They also cited the need for more information about past violence when deciding bail and sentences in domestic violence cases (ninety percent agreed).¹³⁹ Sixty-three percent of criminal court judges and seventy-one percent of problem-solving court judges said they should be more involved with community groups in addressing neighborhood safety and quality-of-life concerns.¹⁴⁰ This runs counter to the popular assumption that judges, concerned with neutrality and independence, are unwilling to engage with the community.

How do defendants perceive problem-solving courts? While no national survey has been undertaken, as part of the National Center for State Courts' evaluation of the Midtown Community Court, researchers conducted individual interviews with defendants, who commented on the court's better facilities and faster case processing time.¹⁴¹ Interestingly, they found the sentences meted out by the court tougher than those issued in conventional courts.¹⁴² When asked which court they preferred, however, they chose Midtown because personnel treated them better.¹⁴³

V. DEVELOPING A FUTURE RESEARCH AGENDA

While problem-solving courts and related innovations have generated a solid and growing body of research to date, there remain more unanswered questions than firm conclusions about these judicial experiments. Further, new models are quickly moving to the forefront and producing their own preliminary research findings and future directions. An Urban Institute study, published in April

135. Center for Court Innovation, State Court Judges Survey, Executive Summary (2001) (unpublished survey, on file with the Center for Court Innovation).

136. *Id.*

137. *Id.*

138. Survey Research Center, University of Maryland, College Park, State Court Judges Project #1409 Crosstab 12 (2001) (unpublished report, on file with the Center for Court Innovation).

139. *Id.* at 16.

140. *Id.* at 8.

141. SVIRIDOFF ET AL., *supra* note 54, at 9.

142. *Id.*

143. *Id.*

2002, evaluates the performance of four teen courts (where low-level juvenile offenders are adjudicated by their peers), and sets parameters for further research in this area. Teen courts and other new models must be integrated into a problem-solving court research agenda, drawing upon the same questions and approaches that have been used so far while also helping to shape what the research of the future will look like.

Going forward, the operative questions for problem-solving court researchers may be both the open-ended “Do they work?” query and some more specific questions: How do these programs work? For what populations and under what circumstances? With that in mind, what follows is an attempt to define an agenda for the future of problem-solving court research. It is intended to spark conversation rather than foreclose it. Inevitably, the most provocative questions will emerge at the local level—the product of a dynamic conversation between researchers and practitioners.

A. Studies of the Components

Recognizing that complex problems call for complex solutions, problem-solving courts employ a vast array of ideas and strategies. Nonetheless, as the current Bronx Domestic Violence Court experiment suggests, it is worth isolating some of their core components, such as treatment, graduated sanctions, or judicial monitoring, to more precisely understand how the pieces within the problem-solving court model affect outcomes. What is the “active ingredient” in these experiments? To answer this question, it may make sense to look across projects, for example, studying the role of the judge in drug courts, community courts, and domestic violence courts.

B. Long-Term and Post-Program Outcomes

Researchers face tremendous challenges when they try to gather data about problem-solving court participants, particularly those who have left the programs, either due to graduation or failure. If program drop-outs or failures end up in jail, “post-program” only begins once they get out, which could be years from the original arrest that diverted them to a problem-solving court in the first place. Many studies do not currently track what happens to participants who do not graduate from a problem-solving court, but instead return to traditional adjudication. Nevertheless, post-program outcomes are vital to understanding the long-term effects of problem-solving courts and how they compare to the effects of conventional practice.

C. Other Outcomes for Program Participants

While recidivism may be the holy grail for problem-solving court outcomes, there are a number of other potential effects that bear investigation, particularly as these courts broaden their scope to include difficult populations with histories of mental illness and violence. Graduation exit interviews can shed light on how participants' lives have changed since their first contact with the court. Offenders who were homeless upon arrest may now have a place to live, women who were pregnant and addicted may have given birth to drug-free babies, and people without high school diplomas may have GEDs. Alternatively, participants in long-term treatment may have lost their jobs or their marriages while getting help for their addiction. There are potentially endless consequences, some intended, others not, that might occur from participating in a problem-solving court. Studies can track these types of changes with relative ease while defendants are under the court's control, but again, post-program effects are harder to assess. If all goes well, a problem-solving court graduate will never again have formal contact with the criminal justice system after program completion. Unfortunately, this best of all outcomes makes it difficult for researchers to track other events in the lives of graduates over a longer period of time. For example, it is nearly impossible to determine whether drug court graduates remain sober over time if they are not rearrested.

D. Speed

With increases in caseloads every year, state court systems are looking for ways to reduce backlog and repeat appearances. In some cases, problem-solving courts may alleviate some of the burden on the traditional system by diverting certain types of offenders, but they also require more face time between defendant and judge, better tracking and record-keeping, and more administrative resources while the case is in the system. It is uncertain whether problem-solving courts speed up or slow down the administration of justice.

E. Coercion and the Protection of Rights

Problem-solving courts exert—or threaten to exert—legal force as part of their efforts to change the behavior of offenders. Some

critics have argued that no one should be coerced into treatment.¹⁴⁴ Others have wondered if problem-solving courts diminish the ability of defenders to engage in zealous advocacy on behalf of their clients.¹⁴⁵ Advocates have argued that problem-solving courts have done little to alter the practice of lawyering or the nature of due process but have simply given attorneys and judges more tools to work with.¹⁴⁶ Future research could investigate whether problem-solving courts do indeed represent a change in the way defendants' rights are protected. This might include both qualitative work (how defendants and their attorneys perceive coercion and representation in a problem-solving court) and quantitative work (for example, comparing the number of objections and plea bargains with those of a conventional court).

F. Net Widening

Critics with concerns about defendants' Fourth Amendment rights and the decline of adversarialism in the problem-solving court model are uneasy about the effect of these courts on the actions of other players in the criminal justice system.¹⁴⁷ Does the existence of a drug court, for example, lead police to make arrests they otherwise would not have made? Does an increase in information sharing lead to more scrutiny of specific groups of offenders? Or, more glibly, is there a "build it and they will come" phenomenon at work here? Having created problem-solving courts, will criminal justice agencies feel compelled to ensure their caseloads by any means necessary? Research can help answer these questions by studying arrest patterns and prosecutorial and judicial decision making.

G. Community Impacts

In recent years, a number of new theories (social capital, bowling alone, community efficacy) have been advanced to explain why some neighborhoods are safe, healthy, and economically viable for problem-solving courts and others are not. One of the key ideas running through these theories is that strong communities promote

144. GREG BERMAN & JOHN FEINBLATT, CTR. FOR COURT INNOVATION, PROBLEM SOLVING COURTS: A BRIEF PRIMER, *available at* http://www.courtinnovation.org/pdf/prob_solv_courts.pdf (last visited Mar. 15, 2003).

145. *Id.* at 136.

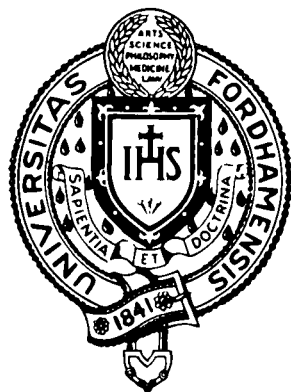
146. *Id.*

147. See SVIRIDOFF ET AL., *supra* note 54, at 3 (noting that some were doubtful that the project would have an effect on "business as usual").

information sharing and coordination among civic institutions, whether they are churches, schools, civic associations, or government agencies. Because of their emphasis on inter-agency collaboration and public engagement, problem-solving courts hold out the possibility that they might contribute to the healthy functioning of the neighborhoods in which they reside. This idea is ripe for further exploration. Does the coordination of services within the court lead to new levels of cooperation among community stakeholders beyond the courthouse? Can courts serve as a bridge between government and citizens? How might researchers document and assess this? These are questions that as yet have attracted little attention in the field.

CONCLUSION

It goes without saying that this Essay only touches the surface of the possibilities for problem-solving court research. The rapid proliferation of these experiments have been driven by more than rhetoric or funding. It has been driven by the ability of problem-solving courts to generate demonstrable results, however provisional or inadequately studied. Framing a research agenda for problem-solving courts is much more than an academic exercise—it is of vital importance to the future of the problem-solving movement. If problem-solving courts hope to continue to thrive, and to move from experiments to institutionalization, they must answer the concerns of critics and continue to win over the agnostics. The only way to do this is through rigorous, independent research that focuses on the questions that matter most to practitioners and policymakers.



THERAPEUTIC JURISPRUDENCE AND PROBLEM SOLVING COURTS

Bruce J. Winick*

I. PROBLEM SOLVING COURTS: A TRANSFORMATION IN THE JUDICIAL ROLE

In the past dozen or so years, a remarkable transformation has occurred in the role of the courts.¹ Courts traditionally have functioned as governmental mechanisms of dispute resolution, resolving disputes between private parties concerning property, contracts, and tort damages, or between the government and an individual concerning allegations of criminal wrongdoing or regulatory violations. In these cases, courts typically have functioned as neutral arbiters, resolving issues of historical facts or supervisingjuries engaged in the adjudicatory process.

Recently, a range of new kinds of problems, many of which are social and psychological in nature, have appeared before the courts. These cases require the courts to not only resolve disputed issues of fact, but also to attempt to solve a variety of human problems that are responsible for bringing the case to court. Traditional courts limit their attention to the narrow dispute in controversy. These newer courts, however, attempt to understand and address the underlying problem that is responsible for the immediate dispute, and to help the individuals before the court to effectively deal with the problem in ways that will prevent recurring court involvement.

The new courts, increasingly known as problem solving courts,² are specialized tribunals established to deal with specific problems, often involving individuals who need social, mental health, or substance abuse treatment services. These courts also include criminal cases involving individuals with drug or alcoholism problems,

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1. Leonore M. J. Simon, *Proactive Judges: Solving Problems and Transforming Communities*, in THE HANDBOOK OF PSYCHOLOGY IN LEGAL CONTEXTS (David Carson & Ray Bull eds., forthcoming) (manuscript at 4-7, on file with author).

2. CONFERENCE OF CHIEF JUSTICES & CONFERENCE OF STATE COURT ADM'RS, CCJ RESOLUTION 22 & COSCA RESOLUTION 4: IN SUPPORT OF PROBLEM-SOLVING COURTS (2000) [hereinafter CCJ RESOLUTION 22 & COSCA RESOLUTION 4], at <http://cosca.ncsc.dni.us/Resolutions/resolutionproblemsolvingcts.html> (last visited Mar. 15, 2002).

mental health problems, or problems of family and domestic violence. The juvenile court is the forerunner of these specialized courts; it was started in Chicago in 1899 as an attempt to provide a rehabilitative approach to the problem of juvenile delinquency, rather than the punitive approach of the adult criminal court.³ The modern antecedents of this movement are the drug treatment courts, founded in Miami in 1989.⁴

The drug treatment court was a response to the recognition that processing nonviolent drug possession charges in the criminal courts and then sentencing the offender to prison did not succeed in changing the offender's addictive behavior.⁵ Criminal court dockets had become swollen with these drug cases, and the essentially retributivist intervention of the criminal court and prison seemed to do little to avoid repetition of the underlying problem.⁶ The result was a "revolving door effect in which [drug offenders typically] resumed their drug-abusing behavior after [being] released from prison."⁷ Instead of relying on the traditional criminal justice approach, the drug treatment court emphasized the offender's rehabilitation, and placed the judge as a member of the

3. See *In re Gault*, 387 U.S. 1, 14-15 (1967) (recapitulating the development of the differences between adult and juvenile justice); Janet Gilbert et al., *Applying Therapeutic Principles to a Family-Focused Juvenile Justice Model (Delinquency)*, 52 ALA. L. REV. 1153, 1159 (2001) (supplying a brief historical background of the Illinois Juvenile Court Act of July 1, 1899, which established the first juvenile court); Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 107 (1909) (describing the establishment of the first juvenile court in Chicago in 1899).

4. John S. Goldkamp, *The Origin of the Treatment Court in Miami*, in THE EARLY DRUG COURTS: CASE STUDIES IN JUDICIAL INTERVENTION 19, 23 (W. Clinton Terry ed., 1999); Peggy F. Hora, *A Dozen Years of Drug Treatment Courts: Uncovering Our Theoretical Foundation and the Construction of a Mainstream Paradigm*, 37 SUBSTANCE USE & MISUSE 1469, 1483 (2002); Bruce J. Winick & David B. Wexler, *Therapeutic Jurisprudence and Drug Treatment Courts: A Symbiotic Relationship*, in PRINCIPLES OF ADDICTION MEDICINE (Allan W. Graham & Terry K. Schultz eds., 3d ed. forthcoming) (manuscript at 2, 6-7, on file with authors) (discussing the relationship between therapeutic jurisprudence and specialized problem solving courts, such as drug treatment courts); see Peggy F. Hora et al., *Therapeutic Jurisprudence and The Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439, 453-54 (1999) (describing drug treatment courts as "judicially initiated treatment solutions for a certain class of drug offenders."); Pamela L. Simmons, *Solving the Nation's Drug Problem: Drug Courts Signal a Move Toward Therapeutic Jurisprudence*, 35 GONZ. L. REV. 237, 258 (1999/2000) (attributing nationwide success of drug courts to therapeutic jurisprudence).

5. See Winick & Wexler, *supra* note 4 (manuscript at 2).

6. See Goldkamp, *supra* note 4, at 20-24; see also Winick & Wexler, *supra* note 4 (manuscript at 2) (discussing the ineffectiveness of criminal courts in permanently changing drug offenders).

7. Winick & Wexler, *supra* note 4 (manuscript at 2).

treatment team.⁸ Offenders accepting diversion to the drug treatment court, or pleading guilty and agreeing to participate in the drug treatment court as a condition of probation, agreed to several conditions; to remain drug-free, "to participate in a prescribed course of drug treatment, to submit to periodic drug testing in order to monitor their compliance [with the treatment plan], and to report [periodically] to court for judicial supervision of their progress."⁹

These court's success in helping many addicts to end their addiction and to avoid re-involvement with the criminal court led to a tremendous growth in the number of drug courts nationally and internationally, with the result that, as of December 2000, there were 697 such courts in America, and many more in the planning stage.¹⁰ Indeed, there now are juvenile drug treatment courts, which specialize in juveniles with drug abuse problems, and dependency drug treatment courts, that deal with families with drug problems that are charged with child abuse or neglect.¹¹

Other specialized treatment courts or problem solving courts, as they are now known, include domestic violence courts,¹² which attempt to protect the victims of domestic violence, to motivate perpetrators of domestic violence to attend batterer's intervention programs, and to monitor compliance with court orders and treat-

8. *Id.* (manuscript at 3).

9. *Id.*

10. CAROLINE S. COOPER, U.S. DEPT OF JUSTICE, 2000 DRUG COURT SURVEY REPORT: PROGRAM OPERATIONS, SERVICES AND PARTICIPANT PERSPECTIVES EXECUTIVE SUMMARY [DRAFT] 3 (2001), available at <http://www.american.edu/academic.depts/spa/justice/publications/execsum.pdf> (last visited Mar. 15, 2003). As of November 2001 there were 502 Adult Drug Courts, 191 Juvenile Drug Courts, 37 Family Drug Courts, and 39 Tribal Drug Courts. *Id.*

11. Barbara A. Babb & Judith D. Moran, *Substance Abuse, Families, and Unified Family Courts: The Creation of a Caring Justice System*, 3 J. HEALTH CARE L. & POL'Y 1, 18 (1999) (describing the creation of the Family Division of the Circuit Court for Baltimore City, Maryland); Amy K. Brown, *Drug Courts Help Keep Families Together*, F.B. NEWS, Sept. 15, 2001, at 1, available at <http://www.flabar.org/> (last visited Mar. 15, 2003).

12. See, e.g., Randal B. Fritzler & Leonore M. J. Simon, *The Development of a Specialized Domestic Violence Court in Vancouver, Washington Utilizing Innovative Judicial Paradigms*, 69 UMKC L. REV. 139, 139 (2000); Amy Karan et al., *Domestic Violence Courts: What Are They and How Should We Manage Them?*, JUV. & FAM. CT. J., Spring 1999, at 75, 75-82; Bruce J. Winick, *Applying the Law Therapeutically in Domestic Violence Cases*, 69 UMKC L. REV. 33, 36 (2000) [hereinafter Winick, *Domestic Violence*].

ment progress.¹³ More than two hundred domestic violence courts now exist.¹⁴

Reentry courts are another form of problems solving courts. These courts were designed to assist offenders that are released from prison into a form of judicially-supervised parole, to effect a successful integration into the community.¹⁵ A recently proposed application of the reentry court model deals with sex offenders and attempts to manage the risk of their reoffending through close supervision and monitoring through the use of polygraph examinations.¹⁶

Another example is the dependency court, a branch of family court that deals with issues of child abuse and neglect.¹⁷ This is a civil court that adjudicates whether child abuse or neglect has occurred, and when it has, it attempts to provide services designed to avoid its repetition.¹⁸ When such services appear fruitless, the dependency court works to terminate parental rights and arrange foster care for the child.¹⁹

Teen court, sometimes known as youth court, is another problem solving court.²⁰ This court deals with cases involving juveniles charged with minor offenses.²¹ In addition, it allows other juveniles who have been through the teen court process, and who

13. Winick, *Domestic Violence*, *supra* note 12, at 36-45.

14. See Karan et al., *supra* note 12, at 75 (finding that in "a 1998 survey over 200 courts reported having some specialized processing practice for domestic violence cases."); Winick, *Domestic Violence*, *supra* note 12, at 39.

15. John Q. LaFond & Bruce J. Winick, *Sex Offender Reentry Courts: A Cost Effective Proposal for Managing Sex Offender Risk in the Community*, in *SEXUAL AGGRESSION: UNDERSTANDING AND MANAGEMENT* (Robert Prentky et al. eds., forthcoming 2003) (manuscript at 26-28, on file with author); Joan Petersilia, U.S. Dep't of Justice, *When Prisoners Return to Communities: Political, Economic, and Social Consequences*, SENTENCING & CORRECTIONS: ISSUES FOR THE 21ST CENTURY, Nov. 2000, at 1, 5, available at <http://www.ncjrs.org/pdffiles1/nij/184253.pdf> (last visited Mar. 15, 2003); Terry Saunders, *Staying Home: Effective Reintegration Strategies for Parolees*, 41 JUDGES' J., Winter 2002, at 34, 35; Jeremy Travis, U.S. Dep't of Justice, *But They All Come Back: Rethinking Prisoner Reentry*, SENTENCING & CORRECTIONS: ISSUES FOR THE 21ST CENTURY, May 2000, at 1, 8, available at <http://www.ncjrs.org/pdffiles1/nij/181413.pdf> (last visited Mar. 15, 2003).

16. LaFond & Winick, *supra* note 15 (manuscript at 27-28).

17. Brown, *supra* note 11, at 1.

18. *Id.*

19. *Id.*

20. See, e.g., Jeffrey A. Butts & Janeen Buck, *The Sudden Popularity of Teen Courts*, 41 JUDGES' J., Winter 2002, at 29, 29; Allison R. Shiff & David B. Wexler, *Teen Court: A Therapeutic Jurisprudence Perspective*, in *LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE* 287, 287-98 (David B. Wexler & Bruce J. Winick eds., 1996).

21. Shiff & Wexler, *supra* note 20, at 287.

have received special training, to play the role of prosecutor, defense attorney, or member of the jury.²² This special process provides the juveniles charged with minor offenses with the ability to see their behavior from the victims' or society's perspective and to receive an inoculation of empathy training.²³

One of the most recent types of problem solving courts to emerge is the mental health court,²⁴ started in 1997 in Broward County, Florida.²⁵ The mental health court is a misdemeanor criminal court designed to deal with people arrested for minor offenses whose major problem is mental illness rather than criminality.²⁶ This is a revolving door category of patients who are periodically committed to mental hospitals where they are treated with psychotropic medication.²⁷ Due to the use of medication, they experience sufficient improvement, which allows hospitals to discharge them, but, when they are back in the community, they fail to take their medication.²⁸ As a result, they frequently decompensate, sometimes committing minor offenses that result in their arrest.²⁹ Mental health courts seek to divert them from the criminal justice system and to persuade them to voluntarily accept treatment while in the community.³⁰ In addition, they link them with treatment re-

22. *Id.* at 289-95.

23. *Id.* at 288.

24. JOHN S. GOLDKAMP & CHERYL IRONS-GUYN, U.S. DEP'T OF JUSTICE, EMERGING JUDICIAL STRATEGIES FOR THE MENTALLY ILL IN THE CRIMINAL CASELOAD: MENTAL HEALTH COURTS IN FT. LAUDERDALE, SEATTLE, SAN BERNARDINO, AND ANCHORAGE 9 (2000), available at <http://www.ncjrs.org/pdffiles1/bja/182504.pdf> (last visited Mar. 15, 2003); Randal B. Fritzler, *How One Misdemeanor Mental Health Court Incorporates Therapeutic Jurisprudence, Preventive Law, and Restorative Justice*, in MANAGEMENT AND ADMINISTRATION OF CORRECTIONAL HEALTH CARE: POLICY, PRACTICE, ADMINISTRATION 14-1 to 14-22 (Jacqueline Moore ed., 2003); Arthur J. Lurigio et al., *Therapeutic Jurisprudence in Action: Specialized Courts for the Mentally Ill*, 84 JUDICATURE 184, 184 (2000); Bruce J. Winick, *Outpatient Commitment: A Therapeutic Jurisprudence Analysis*, 9 PSYCHOL. PUB. POL'Y & L. (forthcoming 2003) (manuscript at 39, on file with author) [hereinafter Winick, *Outpatient Commitment*].

25. John Petrila et al., *Preliminary Observations from an Evaluation of the Broward County Mental Health Court*, 37 CT. REV. 14, 15-16 (2001).

26. *Id.* at 16.

27. Winick, *Outpatient Commitment*, *supra* note 24 (manuscript at 4, 14); see GOLDKAMP & IRONS-GUYN, *supra* note 24, at vii (discussing jail overcrowding and the increased number of persons with mental illness and with co-occurring mental illness and substance abuse in the criminal justice system); Petrila et al., *supra* note 25, at 25 (discussing how mentally ill patients are frequently being arrested).

28. Winick, *Outpatient Commitment*, *supra* note 24 (manuscript at 4, 14).

29. *Id.* (manuscript at 14).

30. GOLDKAMP & IRONS-GUYN, *supra* note 24, at 31, 89; Petrila et al., *supra* note 25, at 14-15.

sources, and provide social service support and judicial monitoring to ensure treatment compliance.³¹

All of these courts grew out of the recognition that traditional judicial approaches have failed, at least in the areas of substance abuse, domestic violence, certain kinds of criminality, child abuse and neglect, and mental illness. These are all recycling problems, the reoccurrence of which traditional interventions did not succeed in bringing to a halt. The traditional judicial model addressed the symptoms, but not the underlying problem. The result was that the problem reemerged, constantly necessitating repeated judicial intervention. All these areas involved specialized problems that judges of courts of general jurisdiction lacked expertise in. Moreover, they involved treatment or social service needs that traditional courts lacked the tools to deal with.

In response to these failures, courts decided that they needed new judicial approaches. These new approaches involve a collaborative, interdisciplinary approach to problem solving where the judge plays a leading role. Not only is the judge a leading actor in the therapeutic drama, but also the courtroom itself becomes a stage for the acting out of many crucial scenes. On this stage, the judge also assumes the role of director, coordinating the roles of many of the actors, providing a needed motivation for how they will play their parts, and inspiring them to play them well.

The new problem solving courts are all characterized by active judicial involvement, and the explicit use of judicial authority to motivate individuals to accept needed services and to monitor their compliance and progress. They are concerned not merely with processing and resolving the court case, but in achieving a variety of tangible outcomes associated with avoiding reoccurrence of the problem. Problem solving courts generate the need for new kinds of information not typically collected by courts, and, in the process, have significantly improved the quality and quantity of information needed to understand the problem and deal more effectively with it.³² They play an educative role in raising community conscious-

31. GOLDKAMP & IRONS-GUYN, *supra* note 24, at 10, 31.

32. See, e.g., LaFond & Winick, *supra* note 15 (manuscript at 8-9) (discussing the use of risk assessment instruments and polygraph examinations to gather information about released sex offenders in order to increase the effectiveness of court supervision and monitoring); Winick, *Domestic Violence*, *supra* note 12, at 55 (discussing the use of risk assessment instruments by domestic violence courts to gather information concerning a batterer's risk of re-offending); Winick & Wexler, *supra* note 4 (manuscript at 2-5) (noting drug treatment court's ongoing and constant intervention into defendant's rehabilitation).

ness about the problem in question, its causes, and the resources that courts need to resolve it.³³ In addition, they become advocates for the populations they deal with and for the increased allocation of community resources needed to resolve their problems.³⁴ Finally, they work closely with community agencies and treatment providers, and, in the process, monitor and improve their effectiveness.³⁵

Problem solving courts represent a significant new direction for the judiciary. These judges seek to actively and holistically resolve both the judicial case and the problem that produced it.³⁶ They extend help to people in need by connecting them to community resources, motivating them through creative uses of the court's authority to accept needed services and treatment, and monitoring their progress in ways that help to ensure their success.³⁷ By targeting recurring problems that seem to be the product of behavioral, psychological, or psychiatric difficulties or disorders, and intervening to prevent their reoccurrence, these courts can be seen as applying a public health approach to social and behavioral problems that cause serious individual suffering and deterioration in the quality of community life. Not only have these techniques emerged in the specialized problem solving courts described above, but also judges in general courts have begun to apply the problem solving approaches derived from these courts.³⁸

33. See, e.g., Hora et al., *supra* note 4, at 462-68; Karan et al., *supra* note 12, at 75; Winick, *Domestic Violence*, *supra* note 12, at 37; Winick, *Outpatient Commitment*, *supra* note 24 (manuscript at 12-13).

34. See, e.g., Hora et al., *supra* note 4, at 453; Winick, *Domestic Violence*, *supra* note 12, at 39-40; Winick, *Outpatient Commitment*, *supra* note 24 (manuscript at 12).

35. Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 831, 833-34 (2000).

36. See *id.* at 832 (discussing how drug treatment courts were created in response to the excessive amount of cocaine and crack offenses, and how their intentions are to rehabilitate these offenders instead of sending them to jail).

37. *Id.* at 843-50.

38. See, e.g., Barbara A. Babb, *Fashioning an Interdisciplinary Framework for Court Reform in Family Law: A Blueprint to Construct a Unified Family Court*, 71 S. CAL. L. REV. 469, 522-23 (1998); Brown, *supra* note 11, at 1; Pamela Casey & David B. Rottman, *Therapeutic Jurisprudence in the Courts*, 18 BEHAV. SCI. & L. 445, 454-55 (2000); Gilbert et al., *supra* note 3, at 1175-77; William Schma, *Judging for the New Millennium*, 37 CT. REV. 4, 4 (2000); David B. Wexler, *Robes and Rehabilitation: How Judges Can Help Offenders Make Good*, 38 CT. REV. 18, 18-19 (2001).

II. THERAPEUTIC JURISPRUDENCE AS A THEORETICAL FOUNDATION FOR PROBLEM SOLVING COURTS

The problem solving courts' revolution has been largely atheoretical. It grew out of experimental approaches used in drug treatment courts to facilitate the substance abuse treatment process, which, because of their success, were transplanted into other judicial arenas.³⁹ These programs appear to be successful, although the empirical research on their efficacy remains preliminary and often methodologically flawed.⁴⁰ Why these programs seem to work, however, has remained largely unexamined.

Therapeutic jurisprudence can be seen as a theoretical grounding for this developing judicial movement. We can understand the problem solving courts' revolution by situating it within the scholarly and law reform approach known as therapeutic jurisprudence.⁴¹ Therapeutic jurisprudence began in the late 1980s as an interdisciplinary scholarly approach in the area of mental health law.⁴² It criticized various aspects of mental health law for producing antitherapeutic consequences for the people that the law was designed to help.⁴³

Legal rules and the way they are applied are social forces that produce inevitable, and sometimes negative, consequences for the

39. See *supra* notes 4-11 and accompanying text.

40. See STEVEN BELENKO, THE NAT'L CTR. ON ADDICTION & SUBSTANCE ABUSE AT COLUMBIA UNIV., RESEARCH ON DRUG COURTS: A CRITICAL REVIEW 2001 UPDATE 26-33 (2001), available at http://www.casacolumbia.org/usr_doc/researchon-drug.pdf (last visited Mar. 15, 2003). Compare Hora et al., *supra* note 4, at 449-50, with Morris Hoffman, *The Drug Court Scandal*, 78 N.C. L. REV. 1437, 1489-90 (2000).

41. See generally DAVID B. WEXLER & BRUCE J. WINICK, ESSAYS IN THERAPEUTIC JURISPRUDENCE 17-18 (1991); BRUCE J. WINICK, THERAPEUTIC JURISPRUDENCE APPLIED: ESSAYS ON MENTAL HEALTH LAW 3-8 (1997); David B. Wexler, *Therapeutic Jurisprudence and Changing Conceptions of Legal Scholarship* [hereinafter Wexler, *Changing Conceptions*], in LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE, *supra* note 20, at 597, 597-610; Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 PSYCHOL. PUB. POL'Y & L. 184, 184 (1997) [hereinafter Winick, *The Jurisprudence*].

42. DAVID B. WEXLER, THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT 3-4 (1990); WEXLER & WINICK, *supra* note 41, at 6.

43. See, e.g., Bruce J. Winick, *Competency to Consent to Voluntary Hospitalization: A Therapeutic Jurisprudence Analysis of Zinermon v. Burch*, 14 INT'L J.L. & PSYCHIATRY 169, 172 (1991) [hereinafter Winick, *Competency to Consent*] (criticizing the United States Supreme Court's broad dicta in *Zinermon v. Burch*, 494 U.S. 113 (1990), that voluntary admission to a mental hospital should always be preceded by an inquiry into the individual's competence to consent to voluntary hospitalization); Bruce J. Winick, *Reforming Incompetency to Stand Trial and Plead Guilty: A Restated Proposal and a Response to Professor Bonnie*, 85 J. CRIM. L. & CRIMINOLOGY 571, 582-85 (1995) [hereinafter Winick, *Reforming Incompetency*] (criticizing incompetency to stand trial doctrine and practice).

psychological well-being of those affected. Therapeutic jurisprudence's basic insight was that scholars should study those consequences and reshape and redesign law in order to accomplish two goals⁴⁴—too minimize antitherapeutic effects, and when it is consistent with other legal goals, to increase law's therapeutic potential.⁴⁵ Thus, therapeutic jurisprudence is an interdisciplinary approach to legal scholarship that has a law reform agenda. Although it started in the area of mental health law, therapeutic jurisprudence soon spread to other areas of legal analysis, and has emerged as a mental health approach to law generally.⁴⁶

Therapeutic jurisprudence is not only concerned with measuring the therapeutic impact of legal rules and procedures, but also of the way they are applied by various legal actors—judges, lawyers, police officers, and expert witnesses testifying in court, among others.⁴⁷ Whether they know it or not, these legal actors are therapeutic agents, affecting the mental health and psychological well-being of the people they encounter in the legal setting. For example, how lawyers deal with their clients in the law office and the courtroom can have a significant impact on a client's emotional well-being, and therapeutic jurisprudence has spawned a growing literature concerning how attorneys should act in this regard.⁴⁸

44. See Bruce Winick, *The Jurisprudence of Therapeutic Jurisprudence*, in LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE, *supra* note 20, at 645, 647-52.

45. *Id.*

46. See David B. Wexler, *Justice, Mental Health, and Therapeutic Jurisprudence*, in LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE, *supra* note 20, at 713, 713-21; Winick, *The Jurisprudence*, *supra* note 41, at 184. For an up-to-date bibliography of therapeutic jurisprudence work, see the Therapeutic Jurisprudence website, at <http://www.therapeuticjurisprudence.org> (last visited Mar. 15, 2003).

47. See Winick, *Domestic Violence*, *supra* note 12, at 91 (proposing a more therapeutic application of the law in domestic violence cases); Winick, *Outpatient Commitment*, *supra* note 24 (manuscript at 31-48) (discussing how judges and lawyers can play their role more therapeutically in conducting civil commitment hearings, conditional release hearings, and in mental health court); Winick, *The Jurisprudence*, *supra* note 41, at 201 (describing the increasing body of therapeutic jurisprudence work ranging across a large spectrum of legal issues); Bruce J. Winick, *Therapeutic Jurisprudence and the Civil Commitment Hearing*, 10 J. CONTEMP. LEGAL ISSUES 37, 52-60 (1999) [hereinafter Winick, *Civil Commitment Hearing*] (proposing how judges, lawyers, and expert witnesses can apply the law more therapeutically in civil commitment cases).

48. See, e.g., PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION (Dennis P. Stolle et al. eds., 2000) (anthology of essays applying therapeutic jurisprudence approach to lawyering); Symposium, *Therapeutic Jurisprudence and Preventive Law: Transforming Legal Practice and Education*, 5 PSYCHOL. PUB. POL'Y & L. 793, 793-1210 (Bruce J. Winick et al. eds., 1999) (containing a symposium

In a similar way, therapeutic jurisprudence has much to offer judges concerning how they treat the people appearing before them and courts concerning how they should be structured and administered to maximize their therapeutic potential. Therapeutic jurisprudence uses insights from psychology and the behavioral sciences to critique legal and judicial practices, and to suggest how they can be reshaped to increase their therapeutic potential and avoid the risk of psychological harm.

Therapeutic jurisprudence is one of the major "vectors" of a growing movement in the law towards a common goal of a more comprehensive, humane, and psychologically optimal way of handling legal matters.⁴⁹ Problem solving courts are also one of these "vectors," and thus, share many common aims with therapeutic jurisprudence.⁵⁰ Thus, one may see problem solving courts as related to therapeutic jurisprudence, but they are not identical with the concept. Problem solving courts often use principles of therapeutic jurisprudence to enhance their functioning. Indeed, the Conference of Chief Justices and the Conference of State Court Administrators, following a joint task force analysis, recently adopted a resolution approving the growing movement in the direction of problem solving courts, and their use of principles of therapeutic jurisprudence in performing their functions.⁵¹ These principles include "integration of treatment services with judicial case processing, ongoing judicial intervention, close monitoring of and immediate response to behavior, multidisciplinary involvement, and collaboration with community-based and governmental organizations."⁵²

Although problem solving courts developed separately from therapeutic jurisprudence, their development occurred at the same time, and they share similar aims. Drug treatment courts, domestic violence courts, and mental health courts, for example, can be seen as taking a therapeutic jurisprudence approach to the processing of

of articles applying the therapeutic jurisprudence/preventive law model to lawyering in various contexts).

49. See Susan Daicoff, *The Role of Therapeutic Jurisprudence within the Comprehensive Law Movement*, in PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION, *supra* note 48, at 465.

50. See Casey & Rottman, *supra* note 38, at 454 (stating that "therapeutic jurisprudence principles are consistent with court performance goals."); David B. Rottman & Pamela Casey, *Therapeutic Jurisprudence and the Emergence of Problem Solving Courts*, NAT'L INST. JUST. J., Summer 1999, at 12-19; Simon, *supra* note 1 (manuscript at 2-7); Winick & Wexler, *supra* note 4 (manuscript at 1).

51. CCJ RESOLUTION 22 & COSCA RESOLUTION 4, *supra* note 2.

52. *Id.*

cases, inasmuch as their goal is the rehabilitation of the offender and their use of the legal process, in particular, the role of the judge, to accomplish this goal.⁵³ All of these courts seek to deal with the offender's underlying problem, and emphasize its resolution through the provision of treatment and rehabilitative services where the judge is an important member of the treatment team.⁵⁴ Judges in these specialized courts receive special training in the nature and treatment of drug addiction,⁵⁵ domestic violence,⁵⁶ and mental illness,⁵⁷ and themselves function as therapeutic agents through their supervision and monitoring of the offender's treatment progress. Unlike traditional judges functioning in traditional courts, judges in problem solving courts consciously view themselves as therapeutic agents, and, therefore, one can see them as playing a therapeutic jurisprudence function in their dealings with the individuals who appear before them.

Moreover, principles of therapeutic jurisprudence can help problem solving court judges play this function well. Therapeutic jurisprudence has already produced a large body of interdisciplinary scholarship analyzing principles of psychology and the behavioral sciences, and probing the ways in which they can be used in legal contexts to improve mental health and emotional well-being.⁵⁸ A growing body of therapeutic jurisprudence scholarship has also addressed how judges in specialized problem solving courts can apply principles of therapeutic jurisprudence in their work.⁵⁹ For instance, a recent symposium issue of *Court Review*, the official publication of the American Judges Association, was devoted entirely

53. See Dorf & Sabel, *supra* note 35, at 841-44, 852; Winick, *Domestic Violence*, *supra* note 12, at 39-45; Winick, *Outpatient Commitment*, *supra* note 24 (manuscript at 31-39).

54. See *supra* notes 7-31 and accompanying text.

55. Hora et al., *supra* note 4, at 476-77.

56. Winick, *Domestic Violence*, *supra* note 12, at 44.

57. Winick, *Outpatient Commitment*, *supra* note 24 (manuscript at 38).

58. See, e.g., LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE, *supra* note 20 (anthology of therapeutic jurisprudence scholarship ranging across the legal spectrum).

59. See, e.g., Casey & Rottman, *supra* note 38, at 451-52, 455-56; Fritzler, *supra* note 24, at 14-1 to 14-22; Fritzler & Simon, *supra* note 12, at 59-62; Hora, *supra* note 4, at 1472-73, 1477, 1481-84; Hora et al., *supra* note 4, at 476-77; see also Carrie J. Petrucci, *Respect as a Component in the Judge-Defendant Interaction in a Specialized Domestic Violence Court that Utilizes Therapeutic Jurisprudence*, 38 CRIM. L. BULL. 263, 266-67, 288-94 (2002); Shiff & Wexler, *supra* note 20, at 291-95 (discussing the therapeutic jurisprudence of teen courts); Simon, *supra* note 1 (manuscript at 6); Winick, *Outpatient Commitment*, *supra* note 24 (manuscript at 36); Winick & Wexler, *supra* note 4 (manuscript at 1-7).

to therapeutic jurisprudence and its application to judging.⁶⁰ An understanding of therapeutic jurisprudence's approach and of the psychological and social work principles it uses can thus provide considerable help in the structuring of problem solving courts and in defining the role played by judges functioning within them.

Both therapeutic jurisprudence and problem solving courts see the law as an instrument for helping people, particularly those with a variety of psychological and emotional problems. Our society has not done a particularly good job of dealing with many social problems, with the result that society often dumps them at the doorstep of the courthouse. When courts deal with such vexing problems as drug addiction, alcoholism, domestic violence, mental illness, child abuse and neglect, and juvenile delinquency, they can be seen to function as psychosocial agencies. In order for problem solving courts to succeed and function well, however, they need to be aware of some basic principles of psychology and social work. Thus, therapeutic jurisprudence can be understood as providing a theoretical foundation for much of the problem solving court movement, and a variety of principles that can help judges play this new and exciting role.

III. THERAPEUTIC JURISPRUDENCE PRESCRIPTIONS FOR PROBLEM SOLVING COURT JUDGES

Problem solving courts are less involved with the adjudication of historic issues of fact than with functioning as psychosocial agencies that attempt to rehabilitate an offender or provide access to services designed to address the underlying problem that has brought the individual to court and monitor and supervise the treatment process. Therapeutic jurisprudence can provide instrumental prescriptions for how judges in problem solving courts can perform these new tasks.⁶¹ Just as judges dealing with antitrust cases need to understand basic principles of economics and judges dealing with patent cases need to understand basic principles of engineering, judges in problem solving courts, dealing as they do with human problems, need to understand some principles of psychology, the science of human behavior. They must be aware that they are functioning as therapeutic agents, and that how they interact with the individuals appearing before them will have inevitable

60. Symposium, *Therapeutic Jurisprudence*, 37 CT. REV. 1, 1-68 (2000).

61. See Robert F. Schopp, *Therapeutic Jurisprudence: Integrated Inquiry and Instrumental Prescriptions*, 17 BEHAV. SCI. & L. 589, 592-604 (1999) (describing therapeutic jurisprudence as providing "instrumental prescriptions" for law reform).

consequences for their ability to be rehabilitated or otherwise deal with their underlying problems.

Individuals usually appear before problem solving courts because of social or psychological problems they have not recognized, or because of their inability to deal with these problems effectively. They may have alcoholism or substance abuse problems, which may contribute to repetitive criminality, domestic violence, or child abuse and neglect.⁶² They may be repetitive perpetrators of domestic violence or child abuse because of cognitive distortions concerning their relationships with their spouses or children, or because they lack the social skills necessary to manage their anger or resolve problems through means other than violence.⁶³ They may suffer from mental illness that impairs their judgment about the desirability of their continuing to take needed medication.⁶⁴ They may be in denial about the existence of these problems, refusing to take responsibility for their wrongdoing, rationalizing their conduct, or minimizing its negative impact on themselves and others. Many of these are problems that will respond effectively to available treatment, but only if the individual perceives that she has a problem and is motivated to deal with it.⁶⁵

In these situations, the problem solving court judge cannot simply order the individual to recognize the existence of the problem and to obtain treatment. People must come to these realizations for themselves. Therefore, problem solving court judges must understand that although they can assist people to solve their problems, they cannot solve them. The individual must confront and solve her own problem and assume the primary responsibility for doing so. The judge can help the individual realize this, and, together with treatment staff, can help the individual to identify and build upon her own strengths and use them effectively in the

62. See Babb & Moran, *supra* note 11, at 8-9; Brown, *supra* note 11, at 1.

63. See Brown, *supra* note 11, at 1; Winick, *Domestic Violence*, *supra* note 12, at 77.

64. See Winick, *Outpatient Commitment*, *supra* note 24 (manuscript at 4, 14) (discussing the conditions and consequences that mentally ill individuals undergo when they fail to take their medication).

65. See Michael D. Clark, *Change-Focused Drug Courts: Examining the Critical Ingredients of Positive Behavior Change*, NAT'L DRUG CT. INST. REV., Winter 2001, at 35, 44-46, 48-56 (suggesting that treatment programs in general are effective, but that factors related to the individual's own strengths are more important in treatment efficacy than the particular form of treatment used, and that court and program staff must build trust and find effective methods to encourage the individual to participate in treatment, affording increased choice and autonomy).

collaborative effort of solving the problem.⁶⁶ How can the judge facilitate this process?

A. Improving Interpersonal Skills

At the outset, the judge should always treat the individual with dignity and respect.⁶⁷ Treatment is a collaborative process between the individual and the treatment team, including the judge, and the conditions necessary to forge a genuine treatment alliance include reciprocal understanding, mutual affirmation, emotional attachment, and respect.⁶⁸ Therefore, the judge and treatment personnel must act so as to give the individual the perception that they are empathic, accepting, warm, and willing to permit self-expression.⁶⁹

Judges performing these functions need to improve their interviewing, counseling, and interpersonal skills. Even though they have engaged in wrongdoing, a special sensitivity to the individual's pain, shame, sadness, and anxiety in coming to terms with the existence of psychological or behavioral problems that have produced criminality and the victimization of others is called for in the judge-offender interaction.⁷⁰ Even though judges may strongly disapprove of the individual's conduct, they must strive in the judge-offender dialogue to be supportive, empathetic, warm, and good listeners.⁷¹ These are highly sensitive conversations and offenders will be less likely to recognize their problems and resolve to deal with them effectively if they perceive the judge to be cold, insensitive, or judgmental. This is not to say that the judge should excuse or justify the individual's inappropriate behavior, but the judge should direct her disapproval at the individual's antisocial conduct, and not at the individual herself.⁷² Once the individual has come to the recognition that her prior behavior has been inappropriate, the judge and treatment staff should shift to a future-focused orientation that concentrates on the steps needed to solve the prob-

66. See *id.* at 57-58 (discussing strength based approaches and their importance in the drug treatment court treatment process).

67. Petrucci, *supra* note 59, at 285-86.

68. See Clark, *supra* note 65, at 44-46.

69. See *id.*

70. See JOHN BRAITHWAITE, CRIME, SHAME, AND REINTEGRATION 85 (1989); John Braithwaite, *Restorative Justice and Therapeutic Jurisprudence*, 38 CRIM. L. BULL. 244, 257-61 (2002) [hereinafter Braithwaite, *Restorative Justice*].

71. See Braithwaite, *Restorative Justice*, *supra* note 70, at 257-61.

72. *Id.* The literature on restorative justice criticizes the shaming of the individual, recommending instead "reintegrative shaming," a condemnation of the act and not the person. *Id.*

lem.⁷³ Focusing upon past failures, by contrast, can result in demoralization and resignation.⁷⁴ To be an effective agent of change, the judge should convey empathy to the individual, even if not to her act.

Empathy involves the ability to experience another person's feelings and to see the world through that person's eyes.⁷⁵ Empathy has both cognitive and affective components.⁷⁶ The judge should convey both an intellectual response to the individual, communicating that she understands the individual's predicament, and an emotional response, communicating that she shares the individual's feelings. The individual, after all, is a fellow human being with a human problem that the judge is attempting to help her deal with. Therefore, in discussing the individual's problem with her, and the need for rehabilitation or treatment, the judge should communicate a sense of caring, sympathy, genuineness, and understanding.⁷⁷ Just as physicians need to develop their "bed-side manner," judges need to develop what can be termed their "bench-side manner."⁷⁸ This can help create a comfortable space in which offenders can feel free to express their emotions about their problems and deal effectively with them.

Judges playing this role need to be sensitive to the psychological mechanisms of transference and counter-transference, and how they can affect communication in the judge-offender interaction. Transference is an individual's tendency to project onto a current relationship, feelings that originated in prior relationships with others, frequently parents and siblings.⁷⁹ Counter-transference oc-

73. See Michael D. Clark, *Change-Focused Youth Work: The Critical Ingredients of Positive Behavior Change*, 3 J. CENTER FAM. CHILD. & CTS. 59, 63-64 (2001) [hereinafter Clark, *Change-Focused Youth*]; Clark, *Drug Courts*, *supra* note 65, at 53-55.

74. See Clark, *Drug Courts*, *supra* note 65, at 53-54.

75. Bruce J. Winick, *Legal Counseling About Advance Directive Instruments: Client Denial and Resistance in the Advance Directive Context: Reflections on How Attorneys Can Identify and Deal With a Psycholegal Soft Spot*, 4 PSYCHOL. PUB. POL'Y & L. 901, 909 (1998) [hereinafter Winick, *Legal Counseling*].

76. Gerald A. Gladstein, *Understanding Empathy: Integrating Counseling, Developmental, and Social Psychology Perspectives*, 30 J. COUNSELING PSYCHOL. 467, 468 (1983); Daniel W. Shuman, *The Use of Empathy in Forensic Examinations*, 3 ETHICS & BEHAV. 289, 296 (1993).

77. See DANIEL GOLEMAN, *EMOTIONAL INTELLIGENCE* 145-46 (1995); DANIEL GOLEMAN, *WORKING WITH EMOTIONAL INTELLIGENCE* 137-46 (1998); Marjorie A. Silver, *Therapeutic Jurisprudence/ Preventive Law and Law Teaching: Emotional Intelligence and Legal Education*, 5 PSYCHOL. PUB. POL'Y & L. 1173, 1196-1203 (1999).

78. Cf. Francis Peabody, *The Care of the Patient*, 88 JAMA 877, 877-82 (1927) (discussing the importance of physician's bedside manner).

79. Marjorie A. Silver, *Love, Hate, and Other Emotional Interference in the Lawyer/Client Relationship*, 6 CLINICAL L. REV. 259, 263-65 (1999) [hereinafter Silver,

curs when the judge transfers feelings onto the individual that stem from the judge's own prior relationships.⁸⁰ The judge should be sensitive to the possibility of transference on the part of the individual, and should seek to induce positive transference and avoid negative transference when possible. For example, individuals who have experienced repeated exposures to the criminal justice system because of their repetitive wrongdoing are likely to have had parents, family members, teachers, friends, and others unsuccessfully lecture them about their need to shape up and achieve rehabilitation. To the extent that these individuals infected the lectures with a paternalistic tone, they might have stimulated feelings of resentment and humiliation or produced a degree of resistance or psychological reactance.⁸¹ Hence, problem solving court judges should seek to avoid tainting their interactions with offenders with these prior negative feelings and relational images that these former unsuccessful lectures might have produced.

Similarly, problem solving court judges should be sensitive to the possibility of counter-transference on their own part, which can interfere with their ability to develop rapport with the individual. Judges will inevitably have had prior experiences with criminal offenders that have produced anger and other negative reactions directed at such offenders. The reemergence of these negative feelings engendered in prior relationships with offenders may produce a negative counter-transference toward the individual appearing in the problem solving court that might compromise the problem solving court judge's ability to play the therapeutic role contemplated. Judges, therefore, must be on their guard to avoid such counter-transference, in other words, to avoid associating the individual appearing before them in the problem solving court with prior offenders who may have invoked strong negative emotional reactions.

In helping offenders come to grips with their criminality and underlying psychological and behavioral problems, problem solving court judges need to be good listeners.⁸² Rather than giving the

Love & Hate]; Stephanie Stier, Essay Review, *Reframing Legal Skills: Relational Lawyering*, 42 J. LEGAL EDUC. 303, 310-12 (1992); Winick, *Legal Counseling*, *supra* note 75, at 911.

80. Silver, *Love & Hate*, *supra* note 79, at 262-65; Stier, *supra* note 79, at 312; Winick, *Legal Counseling*, *supra* note 75, at 911-19.

81. See Sharon S. Brehm & Jack W. Brehm, *PSYCHOLOGICAL REACTANCE: A THEORY OF FREEDOM AND CONTROL* 13 (1981).

82. See Clark, *Drug Courts*, *supra* note 65, at 50-51 (discussing the need for improved communication skills in drug treatment court contexts, including the use of

offender a speech, the judge should seek to promote dialogue. At appropriate intervals, the offender should be encouraged to speak, since this will require the judge to stop speaking, signaling to the individual that what she has to say is important. Problem solving court judges need to convey to individuals appearing before them that they genuinely wish to hear them, are interested in their problems, and are interested in attempting to help them find a solution. They need to listen to the individual in ways that are attentive, non-judgmental, and sympathetic. Finally, active listening and passive listening techniques may be helpful in this connection.⁸³

Problem solving court judges also need to learn to read the individual's non-verbal forms of communication and to interpret her underlying feelings.⁸⁴ Non-verbal forms of communication, such as facial expression, body language, and tone of voice, can be important clues for understanding both the individual's emotions in the context of the sensitive judge-offender conversation, and how judges should respond to them.⁸⁵ Attempting to facilitate the individual's acceptance of responsibility for her wrongdoing, and to motivate the individual to accept help for an underlying problem that may contribute to it, requires a high degree of psychological sensitivity on the part of the problem solving court judge.

B. Avoiding Paternalism and Respecting Autonomy

It is important for problem solving court judges to avoid paternalism in these judge-offender interactions. The judge may be fully aware that the individual suffers from an emotional or psychological problem that produces repetitive criminality and that she could respond effectively to available rehabilitative programs. A paternalistic attitude, however, is not likely to help in facilitating the individual's recognition of these realities.

Its recipients often experience paternalism as offensive. Paternalism may create resentment and possibly backfire by producing a

reflective listening, in which the judge or treatment staff member frequently checks the accuracy of what she believes the individual has said); *see also* Steven Keeva, *Beyond the Words: Understanding What Your Client Is Really Saying Makes for Successful Lawyering*, A.B.A. J., Jan. 1999, at 60 (providing pointers on good listening techniques for attorneys to use in lawyer-client conversations); Silver, *supra* note 77, at 1174 (discussing listening skills on the part of lawyers).

83. *See* David A. Binder et al., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* 16-24 (1991); *see also* Winick, *Legal Counseling*, *supra* note 75, at 912.

84. *See* Winick, *Legal Counseling*, *supra* note 75, at 912 (extolling the virtues of "nonverbal responses that express interest, caring, warmth, and sympathy"); *see also* Stier, *supra* note 79, at 309.

85. *See* Winick, *Legal Counseling*, *supra* note 75, at 910-11.

psychological reactance to the advice offered that might be counter-productive.⁸⁶ Many offenders will be in denial about their underlying problems, and paternalism is unlikely to succeed in allowing them to deal with such denial.⁸⁷ Instead, it may produce anxiety and other psychological distress that will make it harder for them to do so.

Accordingly, problem solving court judges should respect the autonomy of the individuals they are seeking to help, thus, allowing them to make decisions for themselves about whether to accept treatment, rather than mandating treatment participation. For example, a problem solving court judge should remind an individual charged with a drug offense that she is free to deal with the charges in criminal court and accept a sentence to prison if found guilty. Drug treatment court is not required, but is only an alternative option. Hence, the judge should remind the offender that the choice is hers, and that she should not elect the drug treatment court unless she is prepared to admit the existence of a problem and express a willingness to deal with it. This is important because the approach can be empowering to such individuals who often feel powerless and helpless.

Individuals should see the role of the problem solving court judge in discussing rehabilitation with the offender as one of persuasion rather than of coercion. Judges should be aware of the psychological value of choice.⁸⁸ Self-determination is an essential aspect of psychological health. Moreover, if individuals who make their own choices perceive them as non-coerced, they will function more effectively and with greater satisfaction. People who feel coerced, by contrast, may respond with a negative psychological reaction,⁸⁹ and may experience various other psychological

86. See BREHM & BREHM, *supra* note 81, at 13; Winick, *Legal Counseling*, *supra* note 75, at 913 (suggesting that if attorneys are not "attentive, nonjudgmental and sympathetic," clients may respond negatively).

87. See Winick, *Legal Counseling*, *supra* note 75, at 903 (warning that lawyers should expect that clients may frequently be in denial); see also Bruce J. Winick, *Redefining the Role of the Criminal Defense Lawyer at Plea Bargaining and Sentencing: A Therapeutic Jurisprudence/Preventive Law Model*, 5 PSYCHOL. PUB. POL'Y & L. 1034, 1064 (1999) [hereinafter Winick, *Redefining*].

88. See BRUCE J. WINICK, THE RIGHT TO REFUSE MENTAL HEALTH TREATMENT 334 (1997) [hereinafter WINICK, RIGHT TO REFUSE]; Bruce J. Winick, *Coercion and Mental Health Treatment*, 74 DENV. L. REV. 1145, 1147 (1997) [hereinafter Winick, *Mental Health*]; Bruce J. Winick, *On Autonomy: Legal and Psychological Perspectives*, 37 VILL. L. REV. 1705, 1707 (1992) [hereinafter Winick, *Autonomy*].

89. See BREHM & BREHM, *supra* note 81, at 49-51 (explaining the results of a test showing that a removal of "freedom" in choice of essay topic caused a significantly higher reactance arousal).

difficulties.⁹⁰ In appropriate circumstances, the judge should communicate to the individual her own views concerning the individual's best interests, but should ultimately cede the choice to the individual. To succeed, treatment or rehabilitation will require a degree of intrinsic motivation on the part of the individual.⁹¹ If she participates in the program only because of extrinsic motivation, then it will be less likely that she will internalize the program goals and genuinely change her attitude and behavior.

The individual should be afforded a choice not only in deciding whether to elect to participate in a problem solving court, but also in the design of the rehabilitative plan, when feasible. Typically, there may be many options available in fashioning such a plan, including variations in rehabilitative techniques and service providers.⁹² The problem solving court judge can lay the options out for the individual, who can then exercise choice. The individual's choice concerning the various issues that arise in the design of the treatment plan can be empowering, and can influence the likelihood of success.

Some problem solving court judges describe what they do as "benevolent coercion," and extol the virtues of judicial coercion as an essential ingredient in the rehabilitative enterprise.⁹³ While many of the individuals in drug treatment or other problem solving courts who agree to participate in a course of treatment or rehabilitation will benefit from the structure, supervision, and compliance monitoring that they provide, it is neither appropriate nor desirable to regard this as coercion.⁹⁴ An individual who decides to accept diversion to a drug treatment or other problem solving court, or to plead guilty and accept treatment in a problem solving court program as a condition of probation, is making a legally voluntary

90. See Bruce J. Winick, *The Side Effects of Incompetency Labeling and the Implications for Mental Health Law*, 1 PSYCHOL. PUB. POL'Y & L. 6, 13-22 (1995) [hereinafter Winick, *Side Effects*].

91. See ALBERT BANDURA, *SOCIAL FOUNDATIONS OF THOUGHT AND ACTION: A SOCIAL COGNITIVE THEORY* 471-72, 477-78 (1986); Bruce J. Winick, *Harnessing the Power of the Bet: Wagering With the Government as a Mechanism for Social and Individual Change*, 45 U. MIAMI L. REV. 737, 762-63 (1991) [hereinafter Winick, *Harnessing*]; see also EDWARD DECI, *INTRINSIC MOTIVATION* 53 (Elliot Aronson ed., 1975).

92. See Babb & Moran, *supra* note 11, at 25-34 (detailing the various options available to families who are affected by substance abuse).

93. See, e.g., Jeffrey Tauber, Address at the Eleventh Annual Symposium on Contemporary Urban Challenges at the Fordham University School of Law (Feb. 28, 2002), in *Problem Solving Courts: Adversarial Litigation to Innovative Jurisprudence* 29 FORDHAM URB. L.J. 1755, 1901-05 (2002) ("We have an opportunity through problem-solving courts to use coercion, but to do it in a benevolent way.").

94. See Winick, *Harnessing*, *supra* note 91, at 768-72.

choice as long as she is not subjected to duress, force, fraud, or a form of improper inducement.⁹⁵ Individuals making such choices may be functioning within a coercive context. Although they may face hard choices, none of which may be agreeable, they are in these difficult situations because of their own actions. For example, they were not arrested as a vehicle for forcing them into treatment, but because they possessed drugs or committed some other crime. Moreover, they are free to either plead not guilty and face trial, or plead guilty and receive an appropriate sentence. Therefore, extending to them the additional option of accepting a rehabilitative alternative does not make the choice they will then face a coercive one.

An analogy to plea-bargaining is appropriate. Although offenders who have been offered plea deals may feel that the choice they are required to make is coercive, as long as the prosecutor's offer was not illegal, unauthorized, unethical, or otherwise inappropriate, the courts have held that it does not constitute legal coercion.⁹⁶ Accordingly, if an individual's decision about whether to accept a guilty plea is not coerced, then her decision as to whether to accept diversion to a problem solving court, or to plead guilty and accept treatment through the auspices of such a court as a condition for probation also would not constitute coercion in a legal sense. Plea-bargaining is an example in which individuals face hard choices, but where, absent an offer that is improper, illegal, or unethical, the courts will not consider the choice to be coercive.

Parole from prison presents another example. The criminal justice system may release an individual on parole before the expiration of her prison term, if she accepts certain conditions of parole.⁹⁷ These conditions may include, for example, an undertaking that the individual not use alcoholic beverages or associate with other individuals who have a criminal record.⁹⁸ Unless the conditions of parole are improper or illegal, we would consider the individual's choice to accept these conditions as voluntary, rather than co-

95. ALAN WERTHEIMER, COERCION 172, 267-68, 287, 301, 308 (1987).

96. See *Bordenkircher v. Hayes*, 434 U.S. 357, 363-65 (1978); *Brady v. United States*, 397 U.S. 755, 758 (1970); WERTHEIMER, *supra* note 95, at 172, 267-68, 287, 301, 308; Winick, *Harnessing*, *supra* note 91, at 771 n.107; Winick, *Mental Health*, *supra* note 88, at 1153-55.

97. 18 U.S.C. §§ 3561-3566 (2000).

98. *Id.* § 3563(a)(5), (b)(6).

erced.⁹⁹ Even though the individual's desire to be released from prison might be so powerful that she may feel that she has no real choice other than to accept the conditions of parole, it would be absurd for the law to invalidate her choice on grounds of coercion. As long as the conditions of parole are not unlawful, improper, or unreasonable, parole accords the individual an opportunity that she may find more desirable than serving the remainder of her sentence in prison.

Opportunities for diversion from the criminal process are essentially similar. An individual charged with a crime that must decide between facing her charges or accepting diversion into a rehabilitative program may be facing a hard choice. It is a fair and reasonable choice, however, and is not one that the law will invalidate on grounds of coercion.¹⁰⁰

99. See WERTHEIMER, *supra* note 95, at 172, 267-68, 287, 301, 308 (discussing how choices given to defendants are not considered coercive unless illegally imposed upon them).

100. See *McKune v. Lile*, 122 S. Ct. 2017, 2042-43 (2002) (O'Connor, J., concurring) (distinguishing pressure from compulsion for Fifth Amendment purposes, and noting that compulsion is limited to choices involving grave consequences). At least this is true where diversion is reasonably related to the offense charged, and does not impose conditions that would themselves be unconstitutional. Requiring mental health treatment as part of a diversion program for an individual whose offense does not involve mental illness, for example, would seem to be an arbitrary governmental imposition, arguably offending due process. Moreover, although an individual may have the constitutional right to refuse such treatment, such a right may generally be waived, as long as the waiver is competent, voluntary, and knowing. WINICK, *RIGHT TO REFUSE*, *supra* note 88, at 303, 345-70. While some constitutional rights may be unwaivable, for example the right to be free of cruel and unusual punishment, most will be subject to waiver, at least where the right in question is reasonably related to the governmental purpose sought to be served. See, e.g., *Wyman v. James*, 400 U.S. 309, 317-18 (1971) (requiring waiver of Fourth Amendment right to be free of warrantless searches as condition for receipt of certain welfare benefits when such search was related to assessing continued eligibility for benefits).

It is important that an offender understand the risks of entering into a problem solving court treatment program as part of diversion from the criminal court or as a condition of probation, and it is an important role of defense counsel to ensure that the client possesses this understanding. See Martin Reisig, *The Difficult Role of the Defense Lawyer in a Post-Adjudication Drug Treatment Court: Accommodating Therapeutic Jurisprudence and Due Process*, 38 CRIM. L. BULL. 216, 218-19, 221-23 (2002) (discussing the relationship between a defense lawyer and a defendant and the role the defense lawyer should play). Defense counsel who fail to fully advise their clients in this regard may be depriving them of the effective assistance of counsel guaranteed by the Sixth Amendment, particularly since those offenders who repeatedly fail to comply with program requirements may, as a consequence, be re-diverted back to criminal court for a revocation of probation or a criminal sentence. See Mae C. Quinn, *Whose Team Am I on Anyway? Musings of a Public Defender About Drug Treatment Court Practice*, 26 N.Y.U. REV. L. & SOC. CHANGE 37, 54-56 (2000-2001). Moreover, failing to fully advise the client concerning the potential consequences of

The line between coercion and choice can be a narrow one. Moreover, the concept of legal coercion does not necessarily coincide with the psychological perception of coercion. When judges, attorneys, and other court personnel help individuals consider whether to opt for a problem solving court rehabilitative alternative instead of criminal court, they should rely on persuasion or inducement, and avoid coercion and negative forms of pressure. Of course, once the individual chooses the treatment option, her future actions are constrained by the choice she has voluntarily entered into. Thus, the individual, as a condition for accepting the drug treatment court, may agree to attend a drug treatment program, to remain drug-free, and to submit to periodic drug testing.¹⁰¹ The individual knows that if she fails to comply, the court can apply sanctions (typically graduated sanctions) agreed to in advance by the individual.¹⁰² Moreover, the individual knows that repeated non-compliance can result in expulsion from the program and return to criminal court, or a violation of probation if the individual had pled guilty.¹⁰³ While, in a manner of speaking, these potential sanctions may pressure the individual to comply and even induce her compliance, there is no need to regard this as coercion. It is not legal coercion, and, if properly applied, the individual may not even experienced it as psychologically coercive.

In this connection, problem solving court judges must understand what makes people feel coerced and feel that they have acted voluntarily. They should be aware of the implications of recent research conducted on coercion by the MacArthur Research Network on mental health and the law.¹⁰⁴ This research examined the

entering into a problem solving court program not only can compromise the defendant's rights, but also can undermine the potential for treatment success. *See* Reisig, *supra*, at 218-19, 221-23 (discussing the importance of a defendant's informed consent and waiver); Winick & Wexler, *supra* note 4 (manuscript at 4-5).

101. Winick & Wexler, *supra* note 4 (manuscript at 3).

102. Hora et al., *supra* note 4, at 528.

103. *Id.* at 478, 510.

104. Nancy S. Bennet et al., *Inclusion, Motivation, and Good Faith: The Morality of Coercion in Mental Hospital Admission*, 11 BEHAV. SCI. & L. 295, 296-305 (1993); William Gardener et al., *Two Scales for Measuring Patient Perceptions of Coercion During Mental Hospital Admission*, 11 BEHAV. SCI. & L. 307, 308-20 (1993); Steven K. Hoge et al., *Perceptions of Coercion in the Admission of Voluntary and Involuntary Psychiatric Patients*, 20 INT'L J.L. & PSYCHIATRY 167, 170-81 (1997); Charles W. Lidz et al., *Perceived Coercion in Mental Hospital Admission: Pressures and Process*, 52 ARCHIVE GEN. PSYCHIATRY 1034, 1034 (1995); John Monahan et al., *Coercion and Commitment: Understanding Involuntary Mental Hospital Admission*, 18 INT'L J.L. & PSYCHIATRY 249, 252-55 (1995) [hereinafter Monahan et al., *Coercion and Commitment*]; John Monahan et al., *Coercion in the Provision of Mental Health Services: The*

causes and correlates of what makes people feel coerced. Conducted in the context of mental patients facing involuntary hospitalization, this research concluded that even though patients were subjected to legal compulsion through involuntary civil commitment, they did not feel coerced when treated with dignity and respect by people who they perceived as acting with genuine benevolence, and as providing them with a sense of "voice" (the ability to have their say), and with "validation" (the impression that what they said was taken seriously).¹⁰⁵ This research also showed that there is a correlation between the degrees of perceived coercion, and the kinds of pressures that doctors, families, and friends placed upon the patient.¹⁰⁶ Negative pressures, such as threats and force, tend to make individuals feel coerced, whereas positive pressures, such as persuasion and inducement, do not.¹⁰⁷ Even though courts subject these individuals to the legal compulsion of civil commitment, if treated in these ways, they tend to not feel coerced.

Problem solving court judges should apply the lessons of the MacArthur research on coercion, treating all individuals appearing before them with dignity and respect, and according them voice and validation in the interactions they have with them.¹⁰⁸ They should avoid negative pressures and threats, relying instead on positive pressures like persuasion and inducement. If they do so, it is more likely that they will experience the treatment they have consented to as voluntary, rather than coerced, and as a result, they will experience the psychological benefits of choice,¹⁰⁹ and avoid the negative psychological effects of coercion.¹¹⁰ People resent others treating them as incompetent subjects of paternalism, and suffer a diminished sense of self-esteem and self-efficacy when not permitted to make decisions for themselves.¹¹¹ To the extent that

MacArthur Studies, in COERCION IN MENTAL HEALTH SERVICES (J. Morrissey & John Monahan eds., forthcoming) (manuscript at 5-17, on file with authors) [hereinafter Monahan et al., *Coercion in the Provision*].

105. Monahan et al., *Coercion in the Provision*, *supra* note 104 (manuscript at 12-14, 17).

106. *Id.* (manuscript at 10-12, 17).

107. *Id.* (manuscript at 10-11, 17).

108. See Winick, *Mental Health*, *supra* note 88, at 1166-67.

109. See WINICK, RIGHT TO REFUSE, *supra* note 88, at 303, 327-44; Winick, *Civil Commitment Hearing*, *supra* note 47, at 48-52; Winick, *Outpatient Commitment*, *supra* note 24 (manuscript at 38-39).

110. See Winick, *Mental Health*, *supra* note 88, at 1159.

111. ALBERT BANDURA, SELF-EFFICACY: THE EXERCISE OF CONTROL 12-13 (1997); Winick, *Side Effects*, *supra* note 90, at 6.

the individual experiences her decision to participate in a problem solving court treatment or rehabilitative program as voluntary, it can have significant positive effects on treatment outcome.¹¹²

Therefore, problem solving court judges should avoid paternalism and respect the individual's autonomy. They should encourage and urge the individual to accept needed treatment or rehabilitation. They should use techniques of persuasion or inducement, but avoid a heavy-handed approach, strong negative pressure, and coercion.

If handled properly by the problem solving court judge, conversations about the need for treatment or rehabilitation can be an opportunity for empowering the individual in ways that can have positive psychological value. Such conversations can build self-esteem and self-efficacy, without which these individuals may not feel they can succeed in what might be a long and difficult path to rehabilitation. These conversations can facilitate the individual's sense that she has made a voluntary choice in favor of treatment, which can increase her commitment to achieving the treatment goal, and set in motion a variety of psychological mechanisms that can help to bring it about.

C. Using Persuasion and Sparking Motivation

Persuasion, not coercion, should be the hallmark of judge-offender interactions in problem solving court contexts. Involvement in the judicial process itself can provide an important motivating force that may prompt the individual to reexamine past patterns and seek to undergo change. The process of attempting to persuade the individual in this direction often will occur in conversations with the individual's own defense attorney.¹¹³ At times, however, the judge will participate in the persuasion process through conversations with the individual occurring in open court. When such occasions present themselves, judges functioning in the problem solving court context should remember that judicial conversations that are perceived by the individual as coercive may be counterproductive, and that there is an important difference between coercion and persuasion.¹¹⁴

112. See Michele Cascardi et al., *Procedural Justice in the Context of Civil Commitment: An Analogy Study*, 18 BEHAV. SCI. & L. 731, 736-38 (2000); Winick, *Civil Commitment Hearing*, *supra* note 47, at 40-41, 48.

113. See Astrid Birgden, *Dealing with the Resistant Criminal Client: A Psychologically-Minded Strategy for More Effective Legal Counseling*, 38 CRIM. L. BULL. 225, 226-29, 232-39 (2002); Winick, *Redefining*, *supra* note 87, at 1049-51.

114. See *supra* notes 88-95 and accompanying text.

When the context calls for the judge to attempt to persuade the individual to accept treatment or rehabilitation, the judge's understanding of the social psychology of persuasion will augment her ability to be an effective persuader.¹¹⁵ This body of psychological research identifies three elements of the persuasion process as critical-source, message, and receiver.¹¹⁶ The content of the message, and the way it is delivered, significantly influence the likelihood of persuasion.

Persuasion theory has postulated an elaboration likelihood model, which asserts that certain persuasive elements are influenced by the extent to which the receiver of information is actively involved in the processing of the information presented.¹¹⁷ Under this theory, when the individual receiving the information has a high likelihood of elaboration, this will maximize the potential for successful persuasion, for example, when they engage in issue-relevant thinking about the content of the message itself. It is more likely that a judge will be successful in persuading individuals if the message has personal relevance to them and they have prior knowledge about the issue.¹¹⁸

Individuals facing criminal charges wish to minimize the risk of imprisonment, so they will value strategies that can achieve this result. Problem solving courts should present them with information concerning the rehabilitative alternatives to criminal court that they present, as well as the positive consequences for successfully completing the program, including, in many cases, the dismissal of charges. Then, judges should leave them free to engage in instrumental thinking concerning the value of electing these rehabilitative alternatives. Judges should also give these individuals the opportunity to ask questions about their options, the freedom to engage in their own processing of the information, and the freedom to reach their own decision. Additionally, they should fully encourage individuals facing criminal charges to discuss their options

115. See DANIEL J. O'KEEFE, *PERSUASION: THEORY AND RESEARCH* 134 (1990); see also RICHARD E. PETTY & JOHN T. CACIOPPO, *COMMUNICATION AND PERSUASION: CENTRAL AND PERIPHERAL ROUTES TO ATTITUDE CHANGE* (1986) (discussing the use of central and peripheral persuasion in communication as a method of changing people); Winick, *Legal Counseling*, *supra* note 75, at 915-17.

116. See O'KEEFE, *supra* note 115, at 130-88.

117. PETTY & CACIOPPO, *supra* note 115, at 1-60.

118. See Wendy Wood, *Retrieval of Attitude-Relevant Information From Memory: Effects on Susceptibility to Persuasion and on Intrinsic Motivation*, 42 J. PERSONALITY & SOC. PSYCHOL. 798, 799-800 (1982); Wendy Wood & Carl A. Kallgren, *Communicator Attributes and Persuasion: Recipients' Access to Attitude-Relevant Information in Memory*, 14 PERSONALITY & SOC. PSYCHOL. BULL. 172, 172-73 (1988).

with counsel, and provide them with a reasonable opportunity to see counsel and think about their choices. This form of persuasion, known as "central route" persuasion,¹¹⁹ can be more effective than pressuring the individual to make a decision, and can allow her to internalize the rehabilitative goal and increase the intrinsic motivation needed to accomplish it.

The elaboration likelihood model of persuasion is similar to the motivational interviewing technique developed for use by clinicians to help motivate individuals to deal with problems of addiction and alcoholism.¹²⁰ Thus, problem solving court judges should also master the techniques of motivational interviewing. Although treatment staff¹²¹ and the individual's own attorney¹²² will be primarily involved in conducting such motivational interviews, occasionally problem solving court judges will personally engage in such interviews. Likewise, judges will have the opportunity to reinforce the motivational effects of interviews conducted by the treatment staff or defense attorney.

Five basic principles underlie this technique.¹²³ First, the interviewer needs to express empathy.¹²⁴ This involves understanding the individual's feelings and perspectives without judging, criticizing, or blaming.¹²⁵ Second, the interviewer, in a non-confrontational way, should seek to develop discrepancies between the individual's present behavior and important personal goals.¹²⁶ Applying this approach, the judge should attempt to elicit the individual's underlying goals and objectives.¹²⁷ In addition, the judge should attempt to get the individual to recognize the existence of a problem through the use of interviewing techniques, such as open-ended questioning, reflective listening, providing frequent statements of affirmation and support, and eliciting self-motivational statements.¹²⁸ For example, if the individual wishes to obtain or keep a particular job, the judge can ask questions designed to probe the relationship between her drinking or substance abuse and her poor performance in previous employment that may have

119. PETTY & CACIOPPO, *supra* note 115, at 3-11.

120. WILLIAM R. MILLER & STEPHEN ROLLNICK, MOTIVATIONAL INTERVIEWING: PREPARING PEOPLE TO CHANGE ADDICTIVE BEHAVIOR 51-63 (1991).

121. See Clark, *Drug Courts*, *supra* note 65 (manuscript at 23-27).

122. See Birgden, *supra* note 113, at 237.

123. MILLER & ROLLNICK, *supra* note 120, at 55-62.

124. *Id.* at 55-56.

125. *Id.*

126. *Id.* at 56-58.

127. *Id.*

128. See *id.* (describing the general goal of eliciting discrepancies).

resulted in dismissal. An interviewer will create motivation for change only when individuals perceive the discrepancy between how they are behaving and the achievement of their personal goals.

Third, the interviewer should avoid arguing with the individual, which can be counter productive and create defensiveness.¹²⁹

Fourth, when resistance is encountered, the interviewer should attempt to roll with the resistance, rather than becoming confrontational.¹³⁰ This requires listening with empathy and providing feedback to what the individual is saying by introducing new information, which also allows the individual to remain in control, to make her own decisions, and to create solutions to her problems.

Fifth, it is important for the interviewer to foster self-efficacy in the individual. The individual will not attempt change unless she feels that she can reach the goal, overcome barriers and obstacles to its achievement, and succeed in effectuating change.¹³¹

Problem solving court judges, court officials, treatment professionals working with them, and lawyers counseling clients about their options to enter into problem solving court rehabilitative programs should learn the techniques of motivational interviewing and apply them in their conversations with offenders. These motivational interviewing techniques have recently been adapted for application by criminal defense lawyers dealing with clients who have recurring problems, are in denial about their problems, and are resistant to change.¹³² Additionally, in mental health courts, the techniques have been adapted to apply to lawyers representing clients, mental health professionals, and mental health court judges.¹³³ These techniques can be particularly effective when the individual finds herself in a situation where change is being contemplated.¹³⁴ The individual's arrest and need to face criminal charges can present the pressures needed to create such a teachable moment or therapeutic opportunity in which the individual is ready to contemplate change, accept responsibility for wrongdoing, and consider making a genuine commitment to rehabilitation. The

129. *Id.* at 58-59.

130. *Id.* at 59-60.

131. *Id.* at 60-62.

132. See Birgden, *supra* note 113, at 232-42.

133. See Winick, *Outpatient Commitment*, *supra* note 24 (manuscript at 38-42).

134. See JAMES O. PROCHASKA & JOHN C. NORCROSS, SYSTEMS OF PSYCHOTHERAPY: A TRANSTHEORETICAL ANALYSIS 109-39 (1994); Birgden, *supra* note 113, at 240-41; James O. Prochaska et al., *In Search of How People Change: Applications to Addictive Behaviors*, 47 A. PSYCHOL. 1102, 1108-12 (1992); James O. Prochaska & J. M. Prochaska, *Why Don't Continents Move? Why Don't People Change?*, 9 J. PSYCHOTHERAPY INTEG. 83, 83-102 (1999).

use of motivational interviewing and related psychological strategies as a means to sparking and maintaining the individual's motivation to accept needed treatment can substantially increase the potential of problem-solving courts to help the individual solve her problem.

D. Increasing Compliance

Once the individual has made the decision to enter into a treatment program under the auspices of the problem solving court, the judge's focus should shift to the question of how to assure the individual's compliance with the requirements of the treatment program. A body of therapeutic jurisprudence scholarship has examined how to increase compliance in a variety of legal contexts.¹³⁵ This work has analyzed the adaptation of health care compliance principles and methods of behavioral or contingency contracting to legal contexts and has explored the implications of the psychology of procedural justice for improving compliance with judicial orders. These approaches can easily be adapted for application in the context of problem solving courts.

1. *Health Care Compliance Principles*

A parallel problem arises in the context of medical practice—how can physicians and other healers convince their patients to comply with their medical advice? Patient non-compliance is a significant problem that has been addressed extensively in the medical literature.¹³⁶ Behavioral medicine, a field of medical practice that builds on principles of behavioral psychology, offers much help for the resolution of this problem.¹³⁷ For example, the work of psychologists Donald Meichenbaum and Donald Turk sets forth a number of health care compliance principles, and shows how they can be applied by health care professionals to increase the likeli-

135. See, e.g., David B. Wexler, *Health Care Compliance Principles and the Insanity Acquittee Conditional Release Process* [hereinafter Wexler, *Health Care*], in WEXLER & WINICK, *supra* note 41, at 199, 208-17; Winick, *Harnessing*, *supra* note 91, at 740-88; Winick, *Redefining*, *supra* note 87, at 1062; David B. Wexler, *How the Law Can Use What Works: A Therapeutic Jurisprudence Look at Recent Research on Rehabilitation*, 15 BEHAV. SCI. & L. 365, 367-70 (1997) (book review).

136. See, e.g., DONALD MEICHENBAUM & DENNIS C. TURK, *FACILITATING TREATMENT ADHERENCE: A PRACTITIONER'S GUIDEBOOK* 149-84 (1987).

137. See *id.* (discussing the theory and practice of behavioral medicine).

hood that their patients will follow their treatment recommendations.¹³⁸

Patients frequently fail to comply with treatment recommendations when the physician or other health care professional fails to instruct them adequately concerning the treatment they are asked to follow.¹³⁹ The way the health care professional interacts with the patient during the period when treatment is explained can be most significant.¹⁴⁰ If the physician appears to be distant, distracted, reads case notes, uses professional jargon, asks questions calling for brief "yes" or "no" answers, fails to allow the patient the opportunity to tell her story in her own words, describes the treatment plan imprecisely or in technical terms, acts paternalistically, or is abrupt with the patient, compliance with the health care professional's treatment recommendations will be less likely.¹⁴¹

To increase treatment adherence, Meichenbaum & Turk recommend that the health care provider introduce herself to the patient, avoid jargon, and elicit the patient's views, preferences, and active involvement in designing the treatment plan.¹⁴² Providing patient choice even concerning minor details of treatment can be significant in increasing compliance.¹⁴³ Moreover, adherence is furthered when the physician is perceived as prestigious, competent, caring, and motivated by the patient's best interests.¹⁴⁴ Involving family members and others significant to the patient can also increase compliance.¹⁴⁵ These individuals can provide encouragement and reminders to the patient and can help the physician access information about compliance.¹⁴⁶ Furthermore, when the patient makes a public commitment concerning the treatment plan to significant others, compliance is more likely to occur than when the patient's commitment is privately made.¹⁴⁷ The anticipated disapproval of a respected physician and of the patient's family members, as well as

138. *Id.*; see Wexler, *Health Care*, *supra* note 135, at 199 (discussing health care compliance principles and their application by criminal judges making insanity acquittee conditional release decisions).

139. See Meichenbaum & Turk, *supra* note 136, at 55-60.

140. See *id.* at 78.

141. See *id.*

142. *Id.* at 81.

143. *Id.* at 171.

144. *Id.* at 172.

145. *Id.* at 124.

146. *Id.* at 162.

147. *Id.* at 173-75 (discussing the making of formal commitments through a written instrument).

her own anticipated self-disapproval, can significantly increase the patient's motivation to comply.¹⁴⁸

These health care compliance principles can be adapted for use by judges in problem solving courts. Judges, court personnel, treatment providers, and defense attorneys, should take care to instruct the individual carefully and understandably concerning her obligations relating to participation in the treatment program and reporting to court. The judge should act concerned rather than distant, provide the individual with her undivided attention during conversations, avoid jargon, allow the individual an opportunity for voice, avoid paternalism, and generally treat the individual with respect. At the outset, the judge should encourage the individual's active involvement in both the negotiation and design of the rehabilitative plan, providing as great a degree of choice concerning the details as is possible in the circumstances. The judge should treat the individual with dignity and respect, conveying to the individual that her actions are motivated by the individual's best interests. Whenever possible, the judge should seek to involve family members and significant others in the process during which the individual makes a commitment to participate in treatment, and that commitment should be made in a formal and relatively public way.

2. *Behavioral Contracting*

A behavioral psychology technique known as "behavioral contracting" or "contingency management" captures many of these compliance principles and may be helpful in insuring the individual's compliance with the treatment or rehabilitative program.¹⁴⁹ Under this technique, an explicit, formal contract is entered into between the parties in which specific goals are set forth.¹⁵⁰ Motivation to achieve the goal is facilitated through contract terms providing for a combination of agreed-upon rewards or positive reinforcers for success or aversive conditioners for failure.¹⁵¹ This technique is frequently used in clinical practice, and the combination of positive reinforcement to encourage compliance and aversive conditioning to decrease or extinguish non-compliant behavior

148. *Id.*

149. See Winick, *Harnessing*, *supra* note 91, at 772-89, 793-97 (advocating the adoption of a wager system to cure social ills such as drug addiction, unproductivity in government employment, and repeat criminal offenses, which borrows heavily from behavioral conditioning theory and uses both positive and negative reinforcement).

150. *Id.* at 780-89.

151. *Id.* at 779-81.

can be quite effective.¹⁵² The behavioral contract provides rewards and penalties for the achievement and failure to reach intermediate and long-term goals.¹⁵³ Partial rewards or sanctions can be provided periodically as intermediate goals that are measured at frequent intervals are either achieved or missed, thereby facilitating the progressive shaping of the individual's behavior.¹⁵⁴ Tailoring the rewards and punishments to the individual's incentive preferences, and involving the individual in the process of selecting the goals and reinforcers, when practicable, can significantly increase motivation to comply.¹⁵⁵ Such sub-goals will best maintain self-motivation, provide inducements to action, provide guideposts for performance, and, if attained, will produce self-satisfaction needed to sustain effort.¹⁵⁶

The behavioral contract makes explicit the expectations of everyone involved. Target behaviors are objectified, measurable, and well understood by all parties. The setting of explicit goals is itself a significant factor in their achievement.¹⁵⁷ The behavioral contract is a successful method of ensuring compliance, in part, because of the goal-setting effect,¹⁵⁸ which posits that the mere setting of a goal produces positive expectancies for its achievement that themselves help to bring about success.¹⁵⁹ Goals serve to structure and guide the individual's performance, providing direction and focusing interest, attention, and personal involvement. The behavioral contract also engages other mechanisms of psychology that help to achieve effective performance, including intrinsic motivation, cognitive dissonance, and the psychological value of choice.¹⁶⁰

Such behavioral contracts are explicitly used in many drug court treatment programs.¹⁶¹ Whether or not formally negotiated and executed, individuals agreeing to participate in treatment or reha-

152. *Id.* at 780-81.

153. *Id.* at 758-59.

154. *Id.* at 748 n.31, 758 n.66 (defining shaping as the breaking down of a desired behavior into smaller easier to understand steps).

155. *Id.* at 780-88.

156. *Id.* at 758.

157. *Id.* at 761.

158. *Id.*

159. *Id.*

160. *Id.* at 761-70.

161. See William M. Burdon et al., *Drug Courts and Contingency Management*, 31 J. DRUG ISSUES 73, 74, 78-81 (2001); David Carson, *Civil Proceedings: Legal Frameworks for Psychology's Contribution*, in THE HANDBOOK OF PSYCHOLOGY IN LEGAL CONTEXTS 395, 406 (David Carson & Ray Bull eds., 2d ed. 1995); Simon, *supra* note 1, at 452; Winick & Wexler, *supra* note 4 (manuscript at 4).

bilitation in a variety of problem solving court contexts are, in effect, engaging in behavioral contracting.¹⁶² Offenders that agree to participate in reentry courts and to submit to supervision by the reentry court judge are also engaging in behavioral contracting.¹⁶³ Domestic violence perpetrators who agree to enter a batterer's intervention program as a condition of bail, diversion, or probation are, in effect, engaging in behavioral contracting with the domestic violence court.¹⁶⁴ Individuals with mental illnesses in mental health court who agree to accept treatment in the community as a condition for diversion from the criminal court similarly are engaging in behavioral contracting with the mental health court.¹⁶⁵ These contracts should be explicitly negotiated, written, and agreed to by both the court and the individual in a formal and public way.

Judges in these problem solving courts should understand the psychology of behavioral contracting, and how it can be used to increase motivation, commitment, compliance, and effective performance. Behavioral contracting also increases the satisfaction of people involved in problem solving court programs.¹⁶⁶ Moreover, the process through which the behavioral contract is negotiated and entered into can itself provide an important opportunity for minimizing feelings of coercion that might undermine compliance and successful performance.¹⁶⁷

Rather than rushing through the process in which the individual is asked to make an election in favor of drug treatment court or another problem solving court rehabilitative program,¹⁶⁸ the problem solving court process should regard the individual's decision and the behavioral contract as a significant opportunity for reducing feelings of coercion and inspiring the perception of voluntary choice. As the MacArthur Research Network on Mental Health and the Law research shows, according individuals a sense of voice and validation, treating them with dignity and respect, and conveying to them that the court is acting in good faith and in their best interest will diminish the perception of coercion and increase the

162. See Winick, *Outpatient Commitment*, *supra* note 24 (manuscript at 36).

163. See LaFond & Winick, *supra* note 15 (manuscript at 16-17).

164. See Winick, *Domestic Violence*, *supra* note 12, at 41-42.

165. See Winick, *Outpatient Commitment*, *supra* note 24 (manuscript at 5).

166. See Adele V. Harrell, Address at the Eleventh Annual Symposium on Contemporary Urban Challenges at the Fordham University School of Law (Mar. 1, 2002), in *Problem Solving Courts: Adversarial Litigation to Innovative Jurisprudence*, *supra* note 93, at 1933-36.

167. See Winick, *Mental Health*, *supra* note 88, at 1147.

168. See Quinn, *supra* note 100, at 47; Reisig, *supra* note 100, at 220.

perception of voluntary choice.¹⁶⁹ Individuals opting for a problem solving court rehabilitative program should be reminded that the choice is entirely up to them. In addition, they should be given the opportunity, when practicable, to participate in the negotiation of the behavioral contract and the selection of the reinforcers, sanctions, and conditions that will be used and applied. This participation and involvement should occur in ways that respect their need for voice and validation. If handled properly, the negotiation and entry into the behavioral contract can constitute an important opportunity to engage intrinsic motivation and commitment and to establish a mechanism that will help to assure compliance in ways that the individual will regard as fair.

By requiring an individual accepting drug treatment court to agree to periodic drug testing and reporting to court, the drug treatment court is monitoring compliance with the behavioral contract. When the drug test shows the individual to be drug-free, the drug treatment court judge praises the individual, often in the presence of a room full of attorneys, court personnel, and other drug treatment court participants. Such praise is an important form of positive reinforcement that rewards the individual for compliant behavior, helps to shape future behavior, and builds much needed self-esteem and self-efficacy. At the successful completion of the drug treatment court program, the individual is given a graduation ceremony in court where the arresting officer usually presents a "diploma," the judge offers praise, and there is general applause.¹⁷⁰ When other program participants observe this "graduation" ritual, they themselves receive a form of vicarious reinforcement.¹⁷¹

When the individual's drug test is positive, the judge applies an agreed-upon sanction or aversive conditioner, which is designed to deter future non-compliant behavior.¹⁷² Future incidents of non-compliance are then subjected to graduated sanctions that were agreed to in advance by the individual, as well as verbal disapproval, occurring in the presence of others.¹⁷³ The court maintains

169. Monahan et al., *Coercion in the Provision*, *supra* note 104 (manuscript at 12-14, 17); Winick, *Mental Health*, *supra* note 88, at 1166-67.

170. Steven Belenko, *Diverting Drug Offenders to Treatment Courts: The Portland Experience*, in *THE EARLY DRUG COURTS: CASE STUDIES IN JUDICIAL INTERVENTION*, *supra* note 4, at 108, 127-28.

171. See Albert Bandura, *Social Learning Through Imitation*, in *NEBRASKA SYMPOSIUM ON MOTIVATION* 211, 211-13 (M. Jones ed., 1962); Winick, *Harnessing*, *supra* note 91, at 749.

172. Hora et al., *supra* note 4, at 528.

173. *Id.*

close monitoring and supervision of the treatment process by having the individual report to the court every ten to fourteen days, so that the judge may receive frequent feedback from the treatment team and information concerning whether the individual has remained drug-free.¹⁷⁴

The periodic delivery of positive reinforcement or sanctions contingent upon whether the individual has met intermediate goals helps to maintain the individual's commitment and motivation during the one and one-half to two years that drug treatment court typically requires. In this way, what the drug treatment court does can be seen as an application of behavioral contracting or contingency management, a technique which, if properly applied, can substantially increase the likelihood of treatment success.¹⁷⁵ Other problem solving courts should adapt this approach and all judges in these courts should receive training in its application.

3. *The Psychology of Procedural Justice*

In all of their interactions with the individual, problem solving court judges should be careful to apply procedures that fully respect the individual's participatory and dignitary interests.¹⁷⁶ Therapeutic jurisprudence scholarship has frequently pointed to the literature on the psychology of procedural justice,¹⁷⁷ suggesting that its application in a variety of contexts can achieve therapeutic benefits for the individuals involved.¹⁷⁸ This literature, based on

174. *Id.* at 475.

175. See Burdon et al., *supra* note 161, at 73-90; Winick, *Harnessing*, *supra* note 91, at 799-808.

176. See Winick, *Civil Commitment Hearing*, *supra* note 47, at 53, 57-58.

177. See, e.g., E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988); TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990).

178. See, e.g., Amy D. Ronner, *Songs of Validation, Voice and Voluntary Participation: Therapeutic Jurisprudence, Miranda and Juveniles*, 71 U. CINN. L. REV. (forthcoming) (manuscript at 23-35, on file with author) (discussing the application of therapeutic jurisprudence to juvenile offenders); Amy D. Ronner & Bruce J. Winick, *Silencing the Appellant's Voice: The Antitherapeutic Per Curiam Affirmance*, 24 SEATTLE U. L. REV. 499, 504 (2000); Winick, *Civil Commitment Hearing*, *supra* note 47, at 53, 57-58; Winick, *Domestic Violence*, *supra* note 12, at 33; Winick, *Outpatient Commitment*, *supra* note 24 (manuscript at 8); Bruce J. Winick, *Sex Offender Law in the 1990s: A Therapeutic Jurisprudence Analysis*, 4 PSYCHOL. PUB. POL'Y & L. 505, 537, 565-66 (1998); Bruce J. Winick & Ginger Lerner-Wren, *Do Juveniles Facing Civil Commitment Have a Right to Counsel?: A Therapeutic Jurisprudence Brief*, 71 U. CINN. L. REV. (forthcoming) (manuscript at 3-5, on file with author) (discussing the application of the psychology of procedural justice in the context of juveniles in foster care under state custody when the state seeks to transfer them to residential treatment centers); Winick & Wexler, *supra* note 4 (manuscript at 2-7) (discussing drug treatment court proceedings); see also Amend. R. of Juv. Proc., Fla. R. Juv. P. 8.350,

empirical work in a variety of litigation and arbitration contexts, shows that if people are treated with dignity and respect at hearings, given a sense of "voice," (the ability to tell their story) and "validation" (the feeling that what they have said has been taken seriously by the judge or hearing officer), and generally treated in ways that they consider to be fair, they will experience greater satisfaction and comply more willingly with the ultimate outcome of the proceedings, even if adverse to them.

Thus, according individuals in problem solving court contexts a full measure of procedural justice can help to increase compliance with and successful participation in a treatment or rehabilitative program. For reasons developed earlier, according individuals procedural justice will also diminish their perception of coercion in the judicial process and increase the chances that they will experience the decision to enter into a treatment or rehabilitative program as having been voluntarily made.¹⁷⁹ The resulting perception can itself help to increase the likelihood of genuine participation on the part of the individual, intrinsic motivation, program compliance, and treatment success.¹⁸⁰ These utilitarian reasons for respecting the procedural rights of individuals in problem solving court contexts coalesce with the historic commitment to fairness embodied in the concept of due process of law.¹⁸¹ Even when functioning as psychosocial agencies, problem solving courts should accord the individual a full measure of due process.

CONCLUSION

Therapeutic jurisprudence can contribute much to the functioning of problem solving courts, which can provide rich and fascinating laboratories to generate and refine therapeutic jurisprudence approaches. Considerably more research is needed on the functioning of problem solving courts and their effectiveness in rehabilitating offenders and avoiding recidivism. To the extent that these

804 So. 2d 1206, 1210-11 (2001) (recognizing psychology of procedural justice as providing a therapeutic jurisprudence basis for adopting rule allowing children facing civil commitment to be represented by counsel).

179. See *supra* notes 86-112 and accompanying text (discussing the MacArthur Research Network on Mental Health and the Law research on the causes and correlates of perceived coercion).

180. See Winick, *Civil Commitment Hearing*, *supra* note 47, at 48-49, 60; Winick, *Outpatient Commitment*, *supra* note 24 (manuscript at 30-31); Winick & Wexler, *supra* note 4 (manuscript at 4-5).

181. See Reisig, *supra* note 100, at 216-19; Winick, *Civil Commitment Hearing*, *supra* note 47, at 38, 44-47.

courts are successful, as the preliminary research and many anecdotal reports suggest, there is considerable need to understand why they work and more research is needed on this question. The interaction between the problem solving court judge and the individual seems to be an important ingredient in program success, and more empirical work should probe how this occurs.¹⁸²

This Essay has offered a number of suggestions concerning how judges should act in problem solving court contexts to spark the motivation of the individual to achieve rehabilitation and to increase compliance with treatment. These proposals are derived from psychological literature in other contexts, therefore, further analytical analysis and empirical research are needed concerning the application of these principles in the problem solving court arena.

Problem solving courts are a noble undertaking. They represent a newly broadened conception of the role of the courts, one that is fully consistent with the basic concept of therapeutic jurisprudence. To perform this role effectively, judges need to develop and improve their interpersonal, psychological, and social work skills. Therapeutic jurisprudence can help judges in this effort. Problem solving courts can become natural laboratories for the development and application of therapeutic jurisprudence principles and for research on what works best in the court-involved treatment and rehabilitative process. Therapeutic jurisprudence and problem solving courts share a common mission—how legal rules, judicial practices, and court structures and administration can be redesigned to facilitate the rehabilitative process. Problem solving courts, applying principles of therapeutic jurisprudence, can become an important force for dealing with a number of the most vexing social and psychological problems that affect our communities. Although problem solving courts are not identical with therapeutic jurisprudence, these two approaches can be seen as having a symbiotic relationship.¹⁸³ Together they can do much to transform law into an instrument of healing for both the individual and the community.

182. See Petrucci, *supra* note 59, at 294-95 (acknowledging importance of judge-defendant interaction and recommending future research).

183. See Winick & Wexler, *supra* note 4 (manuscript at 2).

SPECIALIZED COURTS: NOT A CURE-ALL

*Phylis Skloot Bamberger**

INTRODUCTION

Discussion of judicial problem solving in criminal cases through specialized courts is, in reality, a discussion about alternatives to incarceration and the administration of those alternatives.¹ Judicial efforts to avoid inappropriate incarceration by the use of suitable alternative programs is old stuff. It has been going on at least since the advent of the probation system. The story of how New York added pre-trial and pre-sentence programs to post-conviction imprisonment alternatives, and went from probation to specialized courts is well documented.² In the last few years, the focus in many state judicial systems has been on specialized courts to provide the response to societal problems that arise in courts with criminal dockets, including administration of alternatives to incarceration.³ The most well-known of these problem solving courts having criminal case jurisdiction are drug courts and domestic violence courts. Other courts of specialized jurisdiction have also been suggested or funded. These courts are given unique resources and staffing to

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1. There are other specialized courts. For example, community courts are concerned with matters in addition to docketed cases, and compliance courts deal only with cases in which the defendant is already in a program. See Michael Schunk & Judith Phelan, *Problem Solving Courts*, 41 JUDGES J., Winter 2002, at 17. There are also specialized courts for trying felony cases like those in which juveniles are tried. This Essay deals only with specialized courts that are specially staffed, and have access to special services to allow non-incarceratory dispositions.

2. See N.Y. STATE BAR ASS'N, REPORT OF ACTION UNIT NO. 7, at 31-57 (1998) [hereinafter STATE BAR]; N.Y. STATE COMM'N ON DRUGS & THE COURTS, CONFRONTING THE CYCLE OF ADDICTION AND RECIDIVISM 10 (2000) [hereinafter FISKE REPORT]; N.Y. STATE OFFICE OF COURT DRUG TREATMENT, THE FIRST YEAR: REPORT TO CHIEF JUDGE KAYE AND CHIEF ADMINISTRATIVE JUDGE JONATHAN L. LIPPMAN (2002) [hereinafter FIRST YEAR]; N.Y. STATE UNIFIED COURT SYS., REPORT OF THE UNITED COURT SYSTEMS COMMITTEE ON ALTERNATIVE CRIMINAL SANCTIONS 16 (1995) [hereinafter UNIFIED COURT] (detailing, *inter alia*, the need to reduce the burdens on probation courts which has given rise to more specialized courts); Ass'n of the Bar of the City of N.Y., *Report on Alternatives to Incarceration and Probation*, 49 REC. 376 (1994) [hereinafter City Bar] (in 1985, the New York State Division of Probation was reorganized as the Division of Probation and Correctional Alternatives to meet the increasing demand for specialized amounts of probationary contact).

3. See FISKE REPORT, *supra* note 2, at 35 n.81 (discussing alternatives to incarceration in Drug Courts).

administer post-plea sentences that are alternatives to incarceration. They are given access to the professional delivery of diagnosis, screening, and assessment services not generally available to courts of general jurisdiction, as well as to the programs that provide the services.⁴ Specialized courts are part of the continuing effort to avoid putting people in jail or prison when something less drastic will work to the advantage of the defendant and the public, satisfying concerns of humane treatment and reducing the costs of punishment.

Traditionally, the courts of general criminal jurisdiction, however, have assumed the role of administering pre-trial and pre-sentence programs, funded both publicly and privately, that provide education, vocational training, counseling, and substance abuse rehabilitation. And historically, when a non-incarceratory sentence is imposed, probation departments have played the administrative role, selecting the appropriate program, supervising compliance, and acting as liaison with the court when problems arise needing judicial intervention.⁵

The focus on specialized courts requires reexamination of funding and staffing of courts of general jurisdiction to administer alternatives to incarceration. General jurisdiction courts have the authority, at any point in the proceeding, to involve probation eligible defendants who do not come within the scope of the work of specialized courts in alternate programs. Thus, despite the shift to specialized courts, the general jurisdiction judges are left with the administrative responsibility for initiating, effectuating, and monitoring alternates to incarceration, and the responsibility of supervising defendants who are in pre-trial programs as alternatives to jail detention and post-conviction/ pre-sentencing alternatives to prison.

Further, in recent years there has been insufficient funding and staffing of probation services, which, in New York State, is mostly the responsibility of the counties.⁶ According to a recent report by the New York State Commission on Drugs and the Courts,

4. *See id.* at 34.

5. *See id.* at 75 (discussing the role of probation in drug courts).

6. New York State's probation system is organized on a countywide basis; there is one system, however, for New York City. The New York State Division of Probation and Alternatives to Incarceration exercises general supervision over local probation systems and contributes matching funds to local offices. *See id.* at 76; City Bar, *supra* note 2, at 398. Furthermore, state funding to local departments has declined and the caseloads have skyrocketed. *See UNIFIED COURT, supra* note 2, at 17-18; *see also* FISKE REPORT, *supra* note 2, at 76-77.

“[p]robation departments are often underfunded and beset with enormous caseloads which make effective supervision a virtual impossibility. Indeed, in many respects some of the treatment innovations that are described in this Report have arisen to fill the gaps left by the failure of traditional probation supervision.”⁷ While creation, funding, and support of some specialized courts are appropriate, my view from the bench is that all courts should be provided with the panoply of services, including a properly funded probation department, so that alternatives to jail or prison are equally available to all defendants found eligible for them, regardless of the court before which their cases are pending. While specialized courts, such as drug courts, dealing with defendants charged with crimes are of critical importance, I believe that sole or even primary reliance on specialized courts is not sufficient. Rather, for the reasons that follow, what should be done is to make centralized resources available as necessary to all courts in a county or city in which alternatives to incarceration are possible, although not automatic.

I. THE POPULATION DEPENDENT ON COURTS OF GENERAL CRIMINAL JURISDICTION

There are defendants who, for various reasons, are not serviced by specialized courts. Such defendants must seek probation and jail or prison alternatives from the general jurisdiction judges before whom their cases are pending. The defendants include those seeking pre-plea and pre-sentence alternatives to jail, all those seeking a sentence alternative to prison, but who are not in the target population of a specialized court, and all those who choose not to seek early diversion from the traditional court processes into the specialized court.

Offenders who are addicted or substance abusers are the most well-known target population of the specialized court system. Taking specialized drug courts as an example, in New York, the target population is defendants, nineteen years old or older, charged with possession or sale of drugs in an amount below the drug weight needed for the most serious felony drug charge, provided the offense did not occur on certain days and times within a thousand feet of a school, and provided the defendants have no prior felony conviction.⁸ Defendants in the target group who pass a screening

7. FISKE REPORT, *supra* note 2, at 75.

8. *See id.* at 34.

review are placed in substance rehabilitation programs, given intense supervision, and appear regularly before a judge.⁹

There are, however, many cases in which defendants who are addicts are excluded from specialized courts because they have prior convictions, are charged with crimes other than drug law offenses, have sold drugs within a thousand feet of a school at the requisite time, or who have other disqualifying factors. Many would benefit from participation in a program under strict supervision without posing a danger to the community. Their cases remain pending before judges of general jurisdiction.¹⁰ In addition, there are defendants who are substance abusers or addicts who would be excluded from some, although not all, drug courts because they have problems other than addiction. People addicted to drugs may also have heart conditions, asthma, AIDS, positive results for HIV, learning disabilities, emotional disturbances, mental illness, retardation, syndromes from physical or sexual abuse, illiteracy, infirmities from old age, an absence of any marketable skills, and homelessness. These cases remain in general jurisdiction courts where the judge must determine whether to order an alternative to jail or prison in these difficult cases.

Further, specialized drug courts do not reach those defendants who are not addicts, but who do have one or more of the other problems listed above. People charged with crimes who appear before courts of general jurisdiction have such a vast array of problems and needs that, for the most part, there is not a specialized court for each of these separable groups. It is apparent that if specialized courts were established to respond to the needs of each of these groups, an expensive infrastructure and costly staffing would be required in a single court for a comparatively small, although important, population needing help. Defendants with these problems are before the many general jurisdiction judges, who will be the administrators for any pre-sentence program alternative to jail.

Finally, defendants who are eligible for help in a specialized court may choose not to take that option because it comes very early in the processing of the case. The premise of many of the specialized courts is early diversion, and, as noted, a guilty plea by the defendant is required within a short time after the case is commenced in order that the defendant may take advantage of the pro-

9. *See id.* at 33.

10. *See id.* at 34-35.

gram offer.¹¹ If no plea is entered early in the proceedings, the defendant goes through the usual court processes.

While the goal of prompt intervention is often an appropriate consideration for treatment therapy, the defendant has a right to make a thoughtful, voluntary, and knowing decision about whether to plead guilty and take the treatment route. And the defendant has a right to make such a decision after consultation with a lawyer who has information about the pending case. At the early stage in the proceedings, when the specialized court begins intervention, counsel often does not have very much information about the accusations and the case, has had virtually no discovery or police paperwork, and does not know what issues may be present in the case, as, for example, if there is any basis to challenge the admissibility of the evidence against the defendant, or if there is a defense to the charges. Counsel's advice is particularly significant if the plea is to a felony. There is the risk that the felony guilty plea will remain on the defendant's record if the defendant does not complete the program. Further, because only the prosecutor can authorize a reduction in a charge, the plea arrangement may require the defendant to plead to a felony, albeit one not requiring a prison term, even if the defendant successfully completes the program.¹² Even entry of a misdemeanor plea has collateral consequences for the defendant, and she should be advised by counsel of the consequences. When the defendant chooses to exercise constitutional or statutory rights and remain in the court of general jurisdiction, that judge will determine if the alternate sentence is appropriate.

The First Year Report to New York's Chief Administrative Judge concludes that most participants in drug court programs "face severe socioeconomic disadvantages, posing a substantial challenge to rehabilitation efforts and highlighting the importance of supplemental vocational educational or employment services"¹³ The needs of many non-addicted people with criminal cases before the general jurisdiction courts are comparable to those who are addicted. All courts that people come before should be aided in their efforts to provide appropriate supportive alternative programs.

11. *See id.* at 37.

12. N.Y. CRIM. PROC. LAW § 220.10(3)-(4) (McKinney 2002). In addition, under recent federal law, a guilty plea can result in deportation for a non-citizen. *See* 8 U.S.C. § 1227(2) (1999).

13. FIRST YEAR, *supra* note 2, at 9.

II. CASES WHERE PROBLEM SOLVING DISPOSITIONS ARE AVAILABLE TO CRIMINAL COURTS OF GENERAL JURISDICTION

Problem solving when dealing with felony cases is directly affected by the sentencing structure. Many states, including New York, require mandatory prison sentences for many felonies. In New York, the mandatory sentence can be either a determinate or indeterminate sentence, depending on whether the crime is defined as a violent felony.¹⁴ Mandatory sentences are enhanced if the convicted person is a predicate felony offender,¹⁵ or a persistent, violent felony offender.¹⁶

Even within this legal framework of required incarceration, defendants are eligible for non-incarceratory sentences. Judges of general felony and misdemeanor courts can provide alternatives to incarceration for these probation-eligible defendants who are not eligible for processing and sentencing by specialized courts.

Referring to New York as an example, a judge handling felony cases is able to provide an alternative to incarceration in three situations: when the defendant is eligible for youth offender adjudication; when the defendant is charged with a felony requiring incarceration, but the prosecutor agrees that the defendant will be allowed to plead to a lesser charge carrying a non-incarceratory sentence;¹⁷ and when the defendant is charged with a crime, and probation is a permissible sentence.

A. Youth Offender Adjudication

Under New York law, a defendant who is at least sixteen , and not more than nineteen years old at the time the crime is committed, and who has not been previously convicted of a felony, or previously adjudicated a youth offender, is eligible for youth offender adjudication.¹⁸ An eligible youth charged with a felony *may* be adjudicated a youth offender in the court's discretion, "[i]f in the opinion of the court the interest of justice would be served by relieving the eligible youth from the onus of a criminal record and by

14. N.Y. PENAL LAW §§ 70.00(6), 70.02 (McKinney 2002).

15. *Id.* §§ 70.04, 70.06.

16. *Id.* § 70.08.

17. *Id.* § 220.10(3)-(4).

18. N.Y. CRIM. PROC. LAW § 720.10(1)-(2) (McKinney 1995). There are exceptions for certain crimes, but even as to these crimes, the defendant is eligible if the defendant was not the only participant in the crime, and her actions were minor, or there are mitigating circumstances in the commission of the crime. *Id.* § 720.10(2)(a)-(3).

not imposing an indeterminate term of imprisonment of more than four years”¹⁹ The eligible youth charged with a misdemeanor *must* be adjudicated a youth offender if she has not been previously convicted of a crime or adjudicated a youth offender.²⁰ The adjudication allows the court to impose a probation sentence, and to condition probation upon the participation in a program as an alternative to incarceration. If the defendant violates the conditions of probation, an indeterminate prison sentence with a maximum of four years can be imposed.

In a court of general jurisdiction dealing with eligible youths who are charged with felonies normally requiring imprisonment, there are two stages at which the eligible youth can make a positive track record to enable the judge to determine the appropriateness of youthful offender adjudication and the imposition of probation with a program as an alternative to incarceration. The first is prior to conviction by plea or verdict. The second is after conviction. At either of these times, the defendant can be ordered to attend educational, vocational training or substance abuse programs, psychiatric treatments, or other appropriate programs.²¹

To the extent that the judge is uncertain as to whether the defendant should be entitled to youth offender adjudication, the defendant’s participation in any assigned program and her general behavior can provide the basis for the adjudication. Once one is adjudicated a youth offender, if the judge makes the separate decision to impose a sentence of probation, participation in a program can be made a condition.

B. The Prosecutor’s Agreement

In some circumstances where incarceration is mandatory, the defendant enters a plea of guilty to the felony requiring a prison sentence because the prosecutor consents to allow the defendant to remain out of custody, to participate in a program, and, on condition that the defendant completes the program, consents to allow the defendant to withdraw the plea of guilty to the charge requiring imprisonment, and to plead guilty to a crime that permits a non-incarceratory sentence. In Bronx County courts of general jurisdiction, arrangements for this disposition, except in drug cases, are made by the judge acting with the defense counsel.

19. *Id.* § 720.20(1)(a).

20. *See id.* § 720.

21. *See* N.Y. PENAL LAW § 65.10.

There are other cases where the prosecutor makes no initial promise to consent to a plea to a reduced charge, but the defendant, under court supervision, agrees to participate in a structured out-patient or residential program of schooling, vocational training, psychiatric counseling, or other suitable activity. In these cases, the defendant agrees to delay the trial until she can make a track record and entry of a plea is delayed. Here, too, substantial efforts are assumed by the judge to administer the arrangement. The whole undertaking is pursued with the knowledge that the prosecutor makes no promise to consent to the reduced plea or to a probation sentence and, in the end, may reject any such proposal. Yet, there are cases in which the defendant makes a sustained and successful effort in the program, supported by the interest of counsel and under the supervision of the judge. In such circumstances, the prosecutor may determine that it is appropriate to allow the defendant to plead to a crime that will allow the imposition of a probation sentence. Once the sentence is imposed, monitoring and supervision of the defendant rests with the probation department.

C. Crimes for which Probation is a Permissible Sentence

In New York, convictions for misdemeanors and some felonies treated as non-violent by the penal law can result in probation, determinate sentences of up to one year, or indeterminate sentences. Where a choice is permissible, the option of imposing probation is based in part on the judge's evaluation of the history and character of the defendant. Where that history and character raise questions as to the suitability of probation, or where the record is unclear, the judge can order the defendant to participate in a program, and monitor the progress as part of the evaluation. If the record, considering the probation department's pre-sentence report, leaves no question, the judge can immediately impose probation. In the former circumstance, the judge undertakes the administration of the defendant's participation in the program. In the latter circumstance, the probation department undertakes supervision, in accord with the statute.

The possibility of probation for the felony of gun possession²² is an extremely important statutory provision given the number of people charged with that offense, and the large number who can be supervised on probation without any harm to the community.

22. *Id.* §§ 70.02(c)(ii), 265.02(4)-(8).

III. METHODS OF PROBLEM SOLVING IN GENERAL CRIMINAL JURISDICTION COURTS: A VIEW FROM THE BENCH

The importance of the constituency of the courts of general jurisdiction emphasizes the importance of making sure that the commitment to those courts matches the commitment to specialized courts. Both deserve the resources available to administer alternatives to incarceration. In the pre-plea stages of a proceeding, a judge of the general criminal jurisdiction court is responsible for putting in place and supervising any alternative to incarceration. After a plea of guilty or conviction after trial, the judge can ask for the assistance of the probation department in supervising the defendant, or can individually undertake the responsibility. After the imposition of the sentence, the probation department is the administrative and supervising agency until the department re-engages the judge in the event of a problem. This structure depends on two factors: first, the ability of the busy judge to participate in the details of setting up a program for a defendant and supervising that participation; and second, the ability of local probation officers to perform their statutory obligations and traditional functions.

As a judge of general criminal jurisdiction, I have sought to find ways to identify those defendants who should be given an opportunity to avoid jail or prison by participating in programs that are alternatives to incarceration, and I have tried to encourage the efforts of these defendants.

The first task is to find a suitable program to do a screening interview of the defendant. The search for a suitable program is complicated if the defendant has multiple problems, such as drug addiction, AIDS, or mental retardation.²³ Programs assisting defendants with multiple problems are limited. Although in 1994 the Unified Court report recommended use of a data base of all programs and their target populations, there is no updated list of available programs. Nonetheless, over time I have learned about available programs that are funded by local, state, and federal government levels, and by private agencies and foundations. Through repeated efforts, I have learned the names and telephone numbers of directors and intake officers.

The second task is to arrange for admission of the defendant to the program. I have arranged for intake interviews. I have assisted in efforts to obtain necessary documentation required for admission. These documents included school records, as well as mental

23. *See supra* text accompanying note 10.

health records from private doctors and hospitals, prison health services, and public hospitals. I have assisted in attaining medicaid, housing, and other benefits which have been delayed or improperly denied to defendants. In one case, I assisted when the defendant was disqualified for benefits because an outstanding warrant, that had long been resolved, came up on the computer.

The third task is to monitor and supervise the defendant's participation in the program once the defendant is accepted into either an inpatient or outpatient program. Written, detailed, and periodic progress reports are necessary to monitor the defendant. If the reports are not supplied or sufficiently specific, I contact the program personnel for the necessary information.

I also communicate with the program staff to make clear that if the defendant violates program rules, uses drugs, absconds, or is expelled from the program, such incidents must be reported to the court immediately.

In one case, the immediate reporting resulted in a miraculous recovery. The defendant had been placed in a drug rehabilitation program. During the course of attending required counseling, the defendant became highly distressed. The program counselor reported to me that the defendant would be dismissed from the program because the facility could not handle the problem. The program delayed any action until I was able to reach a doctor who agreed to walk the defendant through emergency intake at the psychiatric unit of a hospital. The program representative took the defendant to the hospital. There the defendant was admitted, received several months of treatment, returned to the program and completed it successfully.

The help that I have received from both the prosecutor and defense counsel has demonstrated that judges will greatly benefit in their efforts from a systematized and courtwide administration offering help comparable to that given to specialized courts.

The District Attorney of Bronx County, working with a program called Treatment Alternatives to Street Crime ("TASC"),²⁴ has established a highly organized program of screening, program selection, and supervision for those charged with drug offenses. Once the prosecutor determines that a defendant is eligible, TASC representatives interview the defendant to determine eligibility for one of the programs in the community. TASC collects the necessary paperwork, finds the program, makes sure that the defendant is

24. See Education and Assistance Corporation, Programs & Services, at <http://www.eacinc.org/criminal.htm#Bronx%20tasc> (last visited Jan. 15, 2003).

transported to the program, makes sure that the program supplies the necessary reports, arranges for court dates, and reports missteps, expulsions, and successes. At the completion of the eighteen to twenty-four month program, TASC advises the court whether the imposition of the non-incarceratory promised sentence is appropriate. TASC is a courtwide program, assisting all judges, but is limited to defendants charged with drug offenses deemed eligible by the prosecutor.

In many cases defense counsel has also provided much needed assistance. The time consuming nature of program associated work, and the need to tend to it immediately, however, is sometimes incompatible with the demands of criminal litigation that face every defense lawyer. In the last few years, an agency called Defense Advocacy Services has been providing assistance to locate programs, arrange screening, conduct interviews, collect required paperwork, and escort defendants to program facilities. The program has done an excellent job, often acting beyond the call of duty. This program, like TASC, is available to all judges. Its resources, however, are limited by budget constraints.

There are several programs that have their own administrators who, when contacted by the judge, arrange for screening interviews and do all the administrative work needed for the admission of an defendant accepted into the program. One of the most significant is the St. Elizabeth Ann's program affiliated with St. Vincent's Hospital.²⁵ The program is a dual diagnosis program. For one defendant, it provided a safe and comfortable haven until he died; for another, it restored him to a modicum of health that now enables him to live in circumstances approaching reasonable normalcy.

There are some defendants who are already receiving medical or psychiatric treatment. For these defendants, it makes sense to make those existing arrangements into a program that satisfies the meaning of an alternative to incarceration. In several cases, the prosecutor has agreed to accept a plea to a crime allowing a non-incarceratory sentence after the defendant continued treatment for approximately two years with periodic reporting to me along with the submission of reports from the treatment providers. One of the defendants was treated weekly at a Veterans Administration Hospital where he was trained to take his medication; another was treated by a psychologist and attended a vocational training school;

25. See Saint Vincent Catholic Medical Centers: St. Elizabeth Ann's Health Care & Rehabilitation Center, at <http://www.svcmc.org/stelizabethann> (last visited Jan. 15, 2003).

and another went to a combination of medical and psychiatric clinics.

The remaining need of courts of general jurisdiction, as well as of the community, is a properly funded and staffed probation department. In all the reports, cited above, it has been stated that probation departments, locally funded and organized, must be given resources to fulfill their post-plea supervision responsibilities, also known as interim supervision, and their traditional role as supervisors of those on probation imposed as a sentence.

It appears that the specialized court approach has resulted in neglect of local probation departments, the traditional agencies for providing information to the court about defendants and for providing services and conducting supervision of defendants. They have been inadequately funded, understaffed, and left in the backwater of technological development,²⁶ pre-empted by a new layer of service providers and administrators. This deprivation of resources has caused serious limitations on the traditional functions of local probation offices. Specialized courts did not cause the failure of support for probation departments²⁷ because funding for the two comes from different sources. Nevertheless, it is hoped that the current emphasis on funding and staffing specialized courts will stimulate efforts to reinvigorate regular probation services and staffing. The problems created by the underfunding and consequent underutilization of probation departments affects the work of courts of general criminal jurisdiction. It is, however, the probation department that provides a ready made infrastructure for administering problem solving programs in courts of general criminal jurisdiction.

In 1995, the Unified Court System report concluded that "most judges are unable to assume responsibility for monitoring a sentenced offender's progress in an alternate program. As a result, this responsibility should be borne by the local probation department, which should be appropriately funded for this responsibility."²⁸ The report notes that the statutes require the probation department to monitor the sentenced offender and that the legal obligations make "the probation department ideally suited to fulfill this monitoring function."²⁹ At least since the State Bar's 1988 re-

26. FISKE REPORT, *supra* note 2, at 76-80; UNIFIED COURT, *supra* note 2, at 17-18; City Bar, *supra* note 2, at 398-404.

27. See State Bar, *supra* note 2, at 36-43.

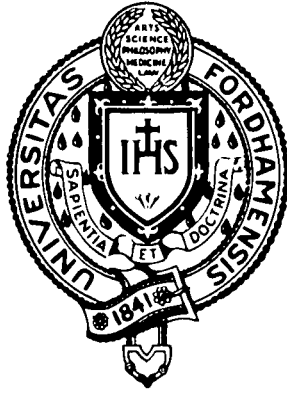
28. UNIFIED COURT, *supra* note 2, at 38.

29. *Id.* at 39.

port, proper and sufficient funding and staffing of probation departments has been recognized as an important need. The significance of that need is enhanced by the present effort not only to supervise people who return to the community, but also people who are in programs as alternatives to prison.

CONCLUSION

Every defendant eligible for a sentence that is an alternate to incarceration should be given the opportunity to have such a sentence. Countywide support services for all courts is the key to making such programs available to every such defendant. To accomplish this important goal, the recognized achievements of specialized courts should be used to generate support services for courts of general jurisdiction and the local probation departments.



RECENT NEW YORK APPELLATE DECISIONS WILL IMPACT MUNICIPAL TORT LITIGATION

*John M. Shields**

INTRODUCTION

Throughout the past thirty years, the *Fordham Urban Law Journal* has progressively published numerous articles concerning a broad range of topics, including discussions of decisions affecting litigation practice and municipal liability.¹ This Article will discuss and summarize the recent significant decisions by the New York State Court of Appeals and other appellate courts that will alter or greatly impact future tort litigation, especially with regard to municipal liability.

Although the State of New York has waived its sovereign immunity, the waiver was not absolute. The waiver of sovereign immunity is specifically conditioned upon compliance with the requirements that accompany the waiver and the standards established by the Court of Claims Act.² In *Alston v. State of New York*,³ the Court of Appeals stressed the potential rigidity of the time limitations for filing a claim against the State, pursuant to the Court of Claims Act.⁴

On several recent occasions, the Court of Appeals thoroughly discussed the “serious injury” standard conditioned within New

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1. See Constantine N. Katsoris, *The Fordham Urban Law Journal: A New Millennium*, 30 FORDHAM URB. L.J. 797 (2003); Constantine N. Katsoris, *The Fordham Urban Law Journal: Twenty Years of Progress*, 19 FORDHAM URB. L.J. 915 (1992).

2. N.Y. CT. CL. ACT §§ 1 *et seq.* (Consol. 2003).

3. 762 N.E.2d 923 (N.Y. 2001).

4. *Id.* at 926.

York Insurance Law.⁵ Accident victims must present admissible evidence that contains verified, quantitative, and objective medical results in order to successfully establish a *prima facie* case that a plaintiff sustained a “serious injury,” as defined by the State Insurance Law.⁶

In more than one decision, the court took the opportunity to clarify the rule of apportionment contained within Article 16 of the Civil Practice Law and Rules (“CPLR”).⁷ Article 16 permits a defendant to seek apportionment of its liability with another tortfeasor. Additionally, apportionment of damages for personal injuries is permissible between a negligent landlord or owner and a non-party assailant in cases involving negligent security.⁸

Twice this past year, the court addressed the standard of care required for the operation of hazard and emergency vehicles.⁹ The court confirmed that “recklessness” was the proper standard of care to apply to “hazard” vehicles.¹⁰ At the same time, the court rejected the argument that such vehicles must be located in a designated “work area” in order to qualify for the hazard vehicle exemption.¹¹

In *Criscione v. City of New York*,¹² the Court of Appeals clarified that a “police officer who was driving a patrol car in response to a [non-emergency] dispatch call was engaged in the ‘emergency operation’ of a vehicle as defined in New York State Vehicle and Traffic Law (“VTL”) [section] 114-b.”¹³ “Consequently, [the officer’s] actions should not be measured by ordinary negligence standards, but rather by the ‘reckless disregard’ standard of [VTL] section 1104(e).”¹⁴

The appellate courts further discussed the requisite standard required to establish municipal liability for the negligent performance of a governmental function.¹⁵ Absent a special relationship,

5. See, e.g., *Toure v. Avis Rent A Car Sys., Inc.*, 774 N.E.2d 1197, 1199-1200 (N.Y. 2002); *Oberly v. Bangs Ambulance*, 751 N.E.2d 457, 460 (N.Y. 2001); *Grossman v. Wright*, 707 N.Y.S.2d 233, 236-37 (App. Div. 2000).

6. N.Y. INS. LAW § 5102(d) (Consol. 2003).

7. See, e.g., *Faragiano v. Town of Concord*, 749 N.E.2d 184, 184-86 (N.Y. 2001); *Rangolan v. County of Nassau*, 749 N.E.2d 178, 181-83 (N.Y. 2001).

8. See, e.g., *Chianese v. Meier*, 774 N.E.2d 722, 725-26 (N.Y. 2002).

9. See, e.g., *Riley v. County of Broome*, 742 N.E.2d 98, 103-05 (N.Y. 2000).

10. *Id.* at 104.

11. *Id.* at 102.

12. *Criscione v. City of New York*, 762 N.E.2d 342, 345 (N.Y. 2001).

13. *Id.* at 343; see N.Y. VEH. & TRAF. LAW § 114-b (Consol. 2003).

14. *Criscione*, 762 N.E.2d at 343; see N.Y. VEH. & TRAF. LAW § 1104(e).

15. See, e.g., *Clark v. Town of Ticonderoga*, 737 N.Y.S.2d 412, 414-16 (App. Div. 2002).

tort liability cannot be fixed for the State's performance of a governmental function.¹⁶ The plaintiff must demonstrate that the State, through direct personal contact, assumed an affirmative duty to act on the injured party's behalf, which was conveyed to the injured party and subsequently relied upon.¹⁷ Courts have recently focused on the most critical element of the special relationship, the injured party's justifiable reliance on the government's assurances.¹⁸ The plaintiff must prove that the defendant's conduct actually placed her in a more dangerous position by creating a false sense of security, causing her to relax her guard and not pursue other options of protection.¹⁹

Similarly, the court reiterated that immunity protects discretionary engineering decisions made by municipalities.²⁰ Recently, the court confirmed that the decision to install a traffic control device is a purely discretionary governmental function, which is completely protected from liability by qualified immunity.²¹ "Something more than a choice between conflicting opinions of experts is required before a governmental body may be held liable for negligently performing its traffic planning function."²² "[N]either letters urging [a municipality] to install a signal nor the recommendation by the [private engineer] that one be installed raises an issue of fact concerning the reasonableness of the [municipality's] determination."²³

Finally, the court discussed whether a party to a contract may be liable in tort to a third party.²⁴ Although a contractual obligation alone does not give rise to tort liability in favor of a third party, the court articulated three specific exceptions that would create liability in such circumstances.²⁵

16. *Id.*

17. *Id.* at 414.

18. *Id.*

19. *Id.* at 415.

20. *See Affleck v. Buckley*, 758 N.E.2d 651, 653-54 (N.Y. 2001).

21. *Id.*

22. *Id.* at 654.

23. *Id.* at 653.

24. *See Church v. Callanan Indus.*, 782 N.E.2d 50, 52 (N.Y. 2002); *Espinal v. Melville Snow Contractors*, 773 N.E.2d 485, 488 (N.Y. 2002).

25. *Church*, 782 N.E.2d at 53.

I. STRICT TIME LIMITATIONS FOR FILING CLAIM AGAINST THE STATE

In *Alston v. State of New York*,²⁶ the Court of Appeals stressed the potential rigidity of the time limitations for filing a claim against the State, pursuant to the Court of Claims Act.²⁷ In *Alston*, after an unsuccessful attempt in federal court by parole officers to recover overtime allegedly earned, the claimants filed a proceeding in the Court of Claims to obtain the same monetary reward.²⁸ The Court of Claims granted the State's motion to dismiss the claims because the claimants failed to timely file their claims pursuant to section 10(4) of the Court of Claims Act.²⁹

"The State's waiver of sovereign immunity was not absolute, but [specifically] conditioned upon claimant's compliance with the [requirements accompanying] the waiver, including the . . . filing [of] deadlines."³⁰ "The Court of Claims Act could not be [more] clear in conditioning the waiver of sovereign immunity on compliance with the [established] time limitations"³¹ The unequivocal language of the Act states that, "*no judgment shall be granted* in favor of any claimant, unless [the] claimant" complies with the existing time limitations.³² "[B]ecause the claimants failed to [timely] file their claims in the Court of Claims . . . and did not timely seek relief from the Court under the Court of Claims Act [section] 10(6), the State was entitled to dismissal of the claim on sovereign immunity grounds."³³

II. REVISITING THE "SERIOUS INJURY" STANDARD UNDER INSURANCE LAW

The Court of Appeals has addressed the "serious injury" standard within the meaning of No-Fault Law, New York State Insur-

26. *Alston v. State*, 762 N.E.2d 923 (N.Y. 2001).

27. *Id.* at 926.

28. *Id.* at 924.

29. *Id.*

30. *Id.* at 926.

31. *Id.*

32. *Id.* (quoting N.Y. Ct. CL. Act § 10 (Consol. 2001)).

33. *Id.*; see *Clark v. City of New York*, 739 N.Y.S.2d 624, 624-25 (App. Div. 2002); *James v. City of New York*, 662 N.Y.S.2d 542, 543 (App. Div. 1997); *Deegan v. City of New York*, 643 N.Y.S.2d 596, 597 (App. Div. 1996); *Ragin v. City of New York*, 636 N.Y.S.2d 83, 84 (App. Div. 1995); *Lamper v. City of New York*, 626 N.Y.S.2d 253, 253 (App. Div. 1995); *Weber v. County of Suffolk*, 616 N.Y.S.2d 807, 808 (App. Div. 1994).

ance Law section 5102(d),³⁴ in several decisions during the past two years. The No-Fault Law provides a system whereby victims of automobile accidents can receive compensation for their economic losses without regard to fault or negligence.³⁵ An injured party may still bring an action to recover for non-economic loss, pain, and suffering, as long as the plaintiff can demonstrate that she has suffered a “serious injury” within the definition of No-Fault Law.³⁶

In *Oberly v. Bangs Ambulance*, the court indicated “that only a ‘total loss’ of use [of a body organ, member, function, or system] is compensable as a ‘permanent loss of use’ exception to the no-fault remedy.”³⁷ In *Oberly*, the plaintiff suffered a minor injury to his forearm when a pump fell on his arm while he was being transported in an ambulance.³⁸ The court held that “the statute speaks in terms of a loss of a body member, without qualification.”³⁹ Additionally, “requiring a total loss is consistent with the statutory [language] of the categories ‘permanent consequential limitation of use of a body or organ or member’ and ‘significant limitation of use of a body function or system.’”⁴⁰ Accordingly, only a total loss of use is compensable under the permanent loss of use exception.⁴¹

A. Nature and Extent of Qualified, Objective Medical Evidence Necessary to Meet the Serious Injury Threshold

In *Toure v. Avis Rent A Car Systems*,⁴² the court consolidated three appeals and focused specifically on the nature and extent of qualified, objective medical evidence required to overcome the serious injury threshold.⁴³ Initially, the court noted that the legisla-

34. “Serious injury” means a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all the material acts which constitutes such person’s usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

N.Y. INS. LAW § 5102 (d) (Consol. 2003).

35. *Oberly v. Bangs Ambulance*, 751 N.E.2d 457, 459 (N.Y. 2001).

36. *Id.* at 458.

37. *Id.* at 459.

38. *Id.* at 458-59.

39. *Id.* at 460.

40. *Id.*

41. *Id.* at 458.

42. *Toure v. Avis Rent A Car Sys., Inc.*, 774 N.E.2d 1197 (N.Y. 2002).

43. *Id.* at 1204-05.

tive intent of the No-Fault Law was to eliminate “frivolous claims and limit recovery to serious injuries.”⁴⁴ The court stressed that objective medical evidence of a plaintiff’s injury is required to satisfy the serious injury threshold.⁴⁵ An expert’s quantitative and qualitative assessment of a plaintiff’s condition may substantiate a claim, “provided that the evaluation [is supported by] an objective basis and compares the plaintiff’s limitations to the normal function, purpose and use of the affected body [part].”⁴⁶

In one case, the plaintiff submitted an affirmation of a neurosurgeon to oppose defendant’s motion for summary judgment.⁴⁷ The court held that the plaintiff, at a minimum, created an issue of fact by submitting an expert’s affirmation supported by objective medical evidence, including Magnetic Resonance Image (“MRI”) and Computerized Tomography (“CT”) scan tests and reports and personal observations, which sufficiently described the qualitative nature of the plaintiff’s limitations.⁴⁸ Similarly, in the second case, the treating orthopedic surgeon described the qualitative nature of plaintiff’s limitations based on the normal function, including the plaintiff’s own medical history, physical examination, and review of the MRI scan.⁴⁹

In the final case, the court held that the plaintiff’s doctor failed to adequately demonstrate a significant limitation.⁵⁰ Although the doctor detected a back spasm, he failed to articulate what objective test, if any, induced the spasm.⁵¹ Additionally, the expert’s conclusion was based, in part, on a review of an MRI report that was never introduced into evidence, thus foreclosing cross-examination.⁵²

B. Threshold for “Serious Injury” Under Insurance Law Requires Admissible, Verified, Objective Medical Findings

Previously, the New York State Supreme Court, Appellate Division, Second Department thoroughly clarified the specific type and quality of admissible evidence necessary to sustain a “serious in-

44. *Id.* at 1199-1200.

45. *Id.*

46. *Id.* at 1200.

47. *Id.* at 1200-01.

48. *Id.* at 1202.

49. *Id.* at 1202-03.

50. *Id.* at 1204.

51. *Id.*

52. *Id.* at 1204-05.

jury” claim. Accident victims must present admissible evidence that contains verified, quantitative, objective medical results in order to successfully establish a prima facie case that the plaintiff sustained a “serious injury.”⁵³

In *Grossman v. Wright*, the plaintiff alleged that, as a result of a motor vehicle accident, he sustained an injury to his back.⁵⁴ “The plaintiff specifically alleged that as a result of the accident, he sustained a ‘significant limitation of use of a body function or system.’”⁵⁵ The defendant moved for summary judgment “on the ground that the plaintiff failed to establish that he had sustained a serious injury.”⁵⁶ “In support of [the] motion, the defendant supplied . . . affirmed medical reports prepared by . . . an orthopedic surgeon and . . . a radiologist.”⁵⁷ The plaintiff submitted an unsworn affidavit prepared by a chiropractor.⁵⁸

Applying an interpretation of the legislative intent, the Court of Appeals determined that the word “significant,” as applied to “‘limitation of use of a body function or system,’ should be construed to mean something more than a minor limitation of use.”⁵⁹ A “minor, mild or slight limitation of use should be classified as insignificant within the meaning of the statute.”⁶⁰ The “legislative intent of the ‘no-fault’ legislation was to [eliminate] frivolous claims and [restrict] recovery to major or significant injuries.”⁶¹ Accordingly, “summary judgment should be granted in cases where the plaintiff’s opposition [consists solely of] ‘conclusory assertions tailored to meet statutory requirements.’”⁶²

C. Defendant Establishes Injuries Are Not “Serious” Through Admissible Medical Evidence

“[A] defendant can establish that the plaintiff’s injuries are not serious within the meaning of [section] 5102(d) by submitting affi-

53. *Grossman v. Wright*, 707 N.Y.S.2d 233, 234 (App. Div. 2000).

54. *Id.* at 235.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 235-36.

59. *Id.* at 236 (quoting *Licari v. Elliot*, 441 N.E.2d 1088, 1091 (N.Y. 1982)).

60. *Id.*

61. *Id.*; *Milne v. Cheema*, 706 N.Y.S.2d 84, 85 (App. Div. 2000).

62. *Grossman*, 707 N.Y.S.2d at 236-37 (citing *Lopez v. Senatore*, 65 N.Y.S.2d 1017, 1019 (App. Div. 1985)); see *Walker v. Betts Cab Corp.*, 710 N.Y.S.2d 28, 28-29 (App. Div. 2000) (concluding that plaintiff’s medical evidence was unsworn, conclusory, and speculative); *Decayette v. Kreger Truck Renting, Inc.*, 687 N.Y.S.2d 680, 681 (App. Div. 1999) (detailing how a plaintiff doctor relied on inadmissible medical records).

davits or affirmations of medical experts who examined the plaintiff and conclude[d] that no objective medical findings support the plaintiff's claim."⁶³ The medical report prepared by the defendant's orthopedic surgeon in *Grossman* stated that he had conducted an independent medical examination of the plaintiff two days earlier.⁶⁴ After a brief absence from work, the plaintiff resumed his full work responsibilities and was no longer undergoing any treatments or taking any prescription medication.⁶⁵ The defendant's chiropractor and radiologist specified the observations made and the objective medical records and tests conducted on the plaintiff during the physical examination.⁶⁶ The diagnosis was that any minor problems were resolved or unrelated to the accident.⁶⁷

D. Plaintiff Must Submit Verified Objective Medical Evidence

Once the defendant has demonstrated prima facie entitlement to summary judgment, the "burden [then] shifts to the plaintiff to come forward with evidence to overcome the defendant's submissions by demonstrating a triable issue of fact that a serious injury was sustained"⁶⁸ "The plaintiff in such a situation must present objective evidence of the injury. The mere parroting of language tailored to meet statutory requirements is insufficient."⁶⁹

A plaintiff's subjective claim of pain and limitation of motion must be supported by quantitative "*verified objective medical findings*," based on objective tests and a recent examination of the plaintiff.⁷⁰ Accordingly, any considerable delay between the conclusion of the "plaintiff's medical treatments after the accident and the physical examination conducted by his own expert must be adequately explained."⁷¹

63. *Grossman*, 707 N.Y.S.2d at 237 (citing *Turchuk v. Town of Wallkill*, 681 N.Y.S.2d 72, 72-73 (App. Div. 1998)).

64. *Id.* at 235.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 237 (citing *Gaddy v. Eyler*, 591 N.E.2d 1176, 1176 (N.Y. 1992)).

69. *Id.* (citing *Powell v. Hurdle*, 625 N.Y.S.2d 634, 634-35 (App. Div. 1995); *Gianakis v. Paschilidou*, 622 N.Y.S.2d 112, 113 (App. Div. 1995)); *Decayette v. Kregar Truck Renting, Inc.*, 687 N.Y.S.2d 680, 681 (App. Div. 1999).

70. *Grossman*, 707 N.Y.S.2d at 237 (citing *Kauderer v. Penta*, 689 N.Y.S.2d 190, 191-92 (App. Div. 1999) (emphasis added)); *Garland v. Allison*, 705 N.Y.S.2d 682, 682-83 (App. Div. 2000).

71. *Grossman*, 707 N.Y.S.2d at 237 (citing *Smith v. Askew*, 695 N.Y.S.2d 405, 406 (App. Div. 1999)); see *Jimenez v. Kambli*, 708 N.Y.S.2d 460, 461 (App. Div. 2000); *Schifano v. Golden*, 701 N.Y.S.2d 406, 407 (App. Div. 2000); *Decayette*, 687 N.Y.S.2d at 681.

In opposition to the motion, the plaintiff in *Grossman* submitted his own affidavit, as well as an affirmation by a doctor of chiropractic medicine, and other medical records, which were presented in unsworn and inadmissible form.⁷² The plaintiff complained that he had been forced to make lifestyle changes as a result of the injuries, that he experienced daily pain, and he could no longer participate in vigorous athletic activities he previously enjoyed.⁷³ As part of the examination, the plaintiff's chiropractor performed range of motion tests on the plaintiff's spine, where he found slight restrictions in the range of motion.⁷⁴

The affirmed report of a medical expert must not only contain objective clinical findings, but also must demonstrate that the plaintiff's injuries are causally related to the subject accident.⁷⁵ Physical examinations personally conducted by the doctor preparing the affidavit or affirmation are sufficient.⁷⁶ "An affidavit or affirmation simply setting forth the observations of the affiant are insufficient, [however,] unless supported by objective proof, such as X-rays, MRIs, or other similarly-recognized tests or quantitative results based on a neurological examination."⁷⁷

E. Opposition in *Grossman* in Inadmissible Form and Failed to Describe Objective Tests

The court in *Grossman* held that the evidence submitted by the defendant in support of her motion was sufficient to establish a prima facie case that the plaintiff did not sustain a "serious" injury.⁷⁸ The medical opinions expressed by the defendant's doctors were supported by a personal physical examination of the plaintiff,

72. *Grossman*, 707 N.Y.S.2d at 235-36.

73. *Id.* at 236.

74. *Id.*

75. *Williams v. Hasenflue*, 708 N.Y.S.2d 343, 343 (App. Div. 2000); *Latiuk v. Cona*, 708 N.Y.S.2d 531, 531 (App. Div. 2000); *Har-Sinay v. Accessible Windows & Glass & Mirror Corp.*, 708 N.Y.S.2d 634, 634 (App. Div. 2000).

76. *Grossman*, 707 N.Y.S.2d at 237 (citing *Cesar v. Felix*, 581 N.Y.S.2d 411, 411-12 (App. Div. 1992)).

77. *Id.*; see *Garvey v. Riela*, 708 N.Y.S.2d 148, 149 (App. Div. 2000); *Green v. Miranda*, 708 N.Y.S.2d 310, 311 (App. Div. 2000); *Mitchell v. Kowalski*, 708 N.Y.S.2d 437, 438 (App. Div. 2000); *Jimenez v. Kambli*, 708 N.Y.S.2d 460, 461 (App. Div. 2000); *Pramnieks v. Bush*, 707 N.Y.S.2d 682, 683 (App. Div. 2000); *Kraemer v. Henning*, 655 N.Y.S.2d 96, 97 (App. Div. 1997); *Zalduondo v. Lazowska*, 651 N.Y.S.2d 117, 117 (App. Div. 1996); *Kim v. Cohen*, 618 N.Y.S.2d 386, 387 (App. Div. 1994); *Georgia v. Ramautar*, 579 N.Y.S.2d 743, 744 (App. Div. 1992); *Spezia v. DeMarco*, 570 N.Y.S.2d 87, 88 (App. Div. 1991).

78. *Grossman*, 707 N.Y.S.2d at 237.

a review of plaintiff's medical records, and the objective physical tests performed on the plaintiff.⁷⁹

By contrast, the court found that the plaintiff's opposition was insufficient to raise a triable issue of fact.⁸⁰ The medical evidence submitted consisted of various reports which were not in admissible form.⁸¹ The affirmation of the plaintiff's chiropractor was not subscribed before a notary or equivalent authorized official, and therefore was not deemed competent evidence.⁸² Regardless, the report failed to present a triable issue of fact as to whether the plaintiff sustained a serious injury, as the report was void of any description of any objective tests performed that substantiated the doctor's conclusions concerning the claimed restrictions in the plaintiff's motion.⁸³

III. THE COURT OF APPEALS CLARIFIES ARTICLE 16 APPORTIONMENT FOR CASES INVOLVING JOINT AND SEVERAL LIABILITY

Article 16 of the CPLR, adopted as part of 1986 Tort Reform Legislation, was drafted to address inequities created by the common law rule of joint and several liability.⁸⁴ "Prior to the [enactment of Article 16,] a joint tortfeasor could be held liable for an entire judgment, regardless of the relative share of culpability."⁸⁵ Thus, joint and several liability provided an incentive to sue "deep pocket" defendants, including municipalities, even if they were only minimally involved with the injury causing event. In 1986, the Governor's Advisory Commission on Liability Insurance recommended that the rule of joint and several liability be amended "to assure that no defendant who is assigned a minor degree of fault

79. *Id.*

80. *Id.*

81. *Id.* (citing *Pagano v. Kingsbury*, 587 N.Y.S.2d 692, 693-95 (App. Div. 1992)).

82. *Id.* at 238 (citing N.Y. C.P.L.R. § 2106 (Consol. 2003)); *see Bernadel v. Beran*, 704 N.Y.S.2d 289, 290 (App. Div. 2000); *Perry v. Pagano*, 699 N.Y.S.2d 882, 882 (App. Div. 1999); *Young v. Ryan*, 697 N.Y.S.2d 150, 151 (App. Div. 1999); *Doumanis v. Conzo*, 696 N.Y.S.2d 201, 202 (App. Div. 1999); *Valencia v. Lui*, 657 N.Y.S.2d 1007, 1007 (App. Div. 1997); *Gill v. O.N.S. Trucking*, 657 N.Y.S.2d 452, 453 (App. Div. 1997).

83. *Grossman*, 707 N.Y.S.2d at 238.

84. *Rangolan v. County of Nassau*, 749 N.E.2d 178, 181 (N.Y. 2001); *Morales v. County of Nassau*, 724 N.E.2d 756, 759 (N.Y. 1999).

85. *Rangolan*, 749 N.E.2d at 181 (citing *Sommer v. Fed. Signal Corp.*, 593 N.E.2d 1365, 1372 (N.Y. 1992)).

can be forced to pay an amount grossly out of proportion to that assignment.”⁸⁶

CPLR section 1601 provides that when there is a verdict for a plaintiff in a personal injury action involving multiple tortfeasors who are jointly liable, and the liability of one of the defendants is found to be fifty percent or less of the total liability, the liability of such defendant for non-economic loss shall not exceed the defendant’s equitable share.⁸⁷ Although Article 16 was intended to remedy the inequities created by joint and several liability where one defendant is found to be minimally at fault, yet where “deep pocket” defendants, including municipalities, remain subject to various exceptions that preserve the traditional rule.⁸⁸

Initially, CPLR section 1602 established that the limitations created by the general rule in section 1601 do not apply to cases involving the use or operation of motor vehicles, although municipalities are entitled to protection for accidents involving fire or police vehicles. Additionally, section 1602(2)(iv) excludes apportionment protection for “any liability arising by the reason of a non-delegable duty.”⁸⁹ The plain language of CPLR section 1602(2)(iv) clearly indicates that the legislature did not intend to create an exception to the apportionment rule, but rather section 1602(2)(iv) was drafted to preserve the principles of vicarious liability and prevent defendants from improperly disclaiming responsibility for non-delegable duties.⁹⁰

A. *Rangolan v. County of Nassau*

In *Rangolan*, the plaintiff, who had cooperated as a confidential informant against other inmates, was seriously beaten by a fellow inmate while incarcerated.⁹¹ Although the plaintiff’s inmate file specifically cautioned that he was not to be housed with his assailant, the two inmates were placed in the same dormitory.⁹² In *Rangolan*, the plaintiff commenced a federal action against the County of Nassau, alleging, among other things, negligence for failure to protect him while in custody and violation of his Eighth

86. *Id.* at 182.

87. N.Y. C.P.L.R. § 1601 (Consol. 2003).

88. *Id.*

89. *Id.* § 1602(2)(iv).

90. *See Rangolan*, 749 N.E.2d at 182-83.

91. *Id.* at 181.

92. *Id.*

Amendment rights under 42 U.S.C. § 1983.⁹³ The district court dismissed his § 1983 claim, but granted judgment as a matter of law on his negligence claim.⁹⁴ The court refused to instruct the jury on apportionment of damages between the county and the attacker, holding that CPLR section 1602(2)(iv) prohibited apportionment where the defendant's liability arose from a breach of a non-delegable duty.⁹⁵

Following a damages award for pain and suffering, both parties appealed to the United States Court of Appeals for the Second Circuit.⁹⁶ The appellate court affirmed the dismissal of the 1983 claim, but, noting the absence of controlling precedent interpreting CPLR section 1602(2)(iv), certified to the New York State Court of Appeals the question whether a municipal tortfeasor can seek to apportion its liability with another tortfeasor, pursuant to CPLR section 1601, or whether CPLR section 1602(2)(iv) precludes such apportionment.⁹⁷

B. CPLR Section 1602(2)(iv) Is Not an Exception to Apportionment, but a Savings Provision that Preserves Vicarious Liability

The Court of Appeals held that under the facts and circumstances of the case in *Rangolan*, the defendant was permitted to seek apportionment of its liability with another tortfeasor, such as the other inmate.⁹⁸ The fact that “the precise ‘shall not apply’ language [drafted] by the legislature to [delineate] the exceptions” to the rule is absent “in section 1602(2)(iv) indicates that the legislature [did not] intend to include an exception for liability based on a breach of a non-delegable duty.”⁹⁹ Therefore, the court in *Rangolan* held that CPLR section 1602(2)(iv) does not create an exception to apportionment, but is a “savings provision that preserves the principles of vicarious liability.”¹⁰⁰

93. *Id.*; see *Rangolan v. County of Nassau*, 51 F. Supp. 2d 233, 233 (E.D.N.Y. 1999), *aff'd in part, question certified by*, 216 F.3d 1073 (2d Cir. 2000).

94. *Rangolan*, 749 N.E.2d at 181.

95. *Id.*; *Sanchez v. State*, 2002 N.Y. LEXIS 3578, at *1 (N.Y. Nov. 21, 2002) (deciding whether an attack on an inmate was foreseeable and holding that the question raised a triable issue of fact).

96. *Rangolan*, 749 N.E.2d at 181.

97. *Id.*

98. *Id.* at 184

99. *Id.* at 182-83.

100. *Id.* at 181; *Rucker v. Allis*, 732 N.Y.S.2d 493, 494 (App. Div. 2001); *Grant v. Ore*, 725 N.Y.S.2d 386, 387-88 (App. Div. 2001) (detailing claim by passenger injured in automobile accident when driver failed to see maintenance work site on bridge).

CPLR section 1602(2)(iv) was drafted to prevent defendants from disclaiming liability for duties for which they are responsible by delegating such responsibilities to another party.¹⁰¹ Accordingly, CPLR section 1602(2)(iv) ensures that a defendant is liable to the same extent as its delegate or employee, and that CPLR Article 16 is not construed to alter this liability.¹⁰² When a municipality delegates a duty for which it is legally responsible, such as the maintenance of its roads, the municipality remains vicariously liable for the negligence of the contractor, and cannot rely on CPLR section 1601(1) to apportion liability with regard to its contractor.¹⁰³ Similarly, CPLR section 1602(2)(iv) prohibits an employer from disclaiming respondeat superior liability by arguing that an employee was the actual tortfeasor.¹⁰⁴ “[N]othing in CPLR 1602(2)(iv),” however, “precludes a municipality, landowner or employer from seeking apportionment between itself and other tortfeasors for whose liability it is not answerable.”¹⁰⁵

“[Section] 1602 [contains] several exceptions to the apportionment rule, [that] explicitly [state] that Article 16 shall ‘not apply’ in certain circumstances.”¹⁰⁶ The *Rangolan* court reasoned that CPLR section 1602(2)(iv) specifically does not contain the “shall not apply” introductory language, “but instead provides that the limitations on liability shall ‘not be construed’ to impair, limit or modify any liability arising from a non-delegable duty or respondeat superior.”¹⁰⁷ The court in *Rangolan* held that “the Legislature did not intend 1602(2)(iv) to establish a free-standing exception to the apportionment rule.”¹⁰⁸ “[Section] 1602(2)(iv) was [simply] intended to insure that the courts did not [interpret] article 16 as altering [established] law regarding respondeat superior or non-delegable duties.”¹⁰⁹

The fact that CPLR section 1602(8), using the “shall not apply” language, creates a separate non-delegable duty exception, reinforces that section 1602(2)(iv) was not intended as an exception to

101. *Rangolan*, 749 N.E.2d at 182.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* (citations omitted); see *Faragiano v. Town of Concord*, 749 N.E.2d 184, 185-86 (N.Y. 2001); *Grant*, 725 N.Y.S.2d at 388; *Denio v. State*, 723 N.Y.S.2d 914, 915 (App. Div. 2001).

106. *Rangolan*, 749 N.E.2d at 182.

107. *Id.*

108. *Id.*

109. *Id.*

the apportionment rule.¹¹⁰ “To construe CPLR 1602(2)(iv) as creating a blanket non-delegable duty exception would render CPLR 1602(8) meaningless and redundant.”¹¹¹ A statutory construction that “‘result[s] in the nullification of one part of a [statute] by another,’ is impermissible” because the various elements of a statute must be compatible with each other and conform with the general intent of the statute.¹¹²

Given the breadth of responsibilities that may be considered non-delegable, each potentially requiring a specific inquiry, the legislature could not have intended to exclude the breach of every non-delegable duty from possible apportionment.¹¹³ “Reading [section] 1602(2)(iv) as an exception would impose joint and several liability on municipalities . . . the[] . . . precise[] . . . entities that [the rule] was designed to protect.”¹¹⁴

In *Faragiano*, the plaintiff was a passenger injured in a motor vehicle accident who commenced an action against several parties, including “the contractor that resurfaced the road and the Town of Concord . . . alleg[ing] that the Town negligently constructed and maintained [the] road and that [the] contractor . . . negligently permitted a build-up of oil or tar on the road.”¹¹⁵ “The Town asserted, as an affirmative defense, that its liability for any noneconomic losses should be apportioned among the other tortfeasors pursuant to CPLR [section 1602(2)(iv)],” while the plaintiffs argued that CPLR section 1602(2)(iv) precluded apportionment.¹¹⁶ The court in *Faragiano* held that the “plaintiffs [could] not rely on CPLR [section] 1602(2)(iv) to preclude the Town from seeking apportionment between itself and other joint tortfeasors for whose liability it was not answerable.”¹¹⁷ The court went on to State, however, that the town could not use CPLR section 1602(2)(iv) to apportion liability to the agent for whom it was vicariously responsible.¹¹⁸

110. *Id.* at 183.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Faragiano v. Town of Concord*, 749 N.E.2d 184, 186 (N.Y. 2001).

116. *Id.*

117. *Id.*; see *Grant v. Ore*, 725 N.Y.S.2d 386, 387-88 (App. Div. 2001).

118. *Faragiano*, 749 N.E.2d at 186.

C. Recent Rulings Concerning Apportionment Relating to Premises Security

Recently, three separate Appellate Division First Department panels issued rulings concerning Article 16 apportionment. In all three cases, the named defendants were sued for simple negligence for failing to secure the premises against an assailant, not named as a party, that injured the plaintiff.

In *Concepcion v. New York City Health and Hospitals Corporation*, the plaintiff was stabbed by an out-patient while visiting a hospital.¹¹⁹ Following a threatening confrontation with the out-patient, plaintiff informed a nurse about the incident, who assured the plaintiff that she would alert security.¹²⁰ The nurse failed to inform security and the plaintiff was assaulted.¹²¹ The Court in *Concepcion* held that:

[t]here is nothing in the exclusion that would indicate that it was intended to preclude a negligent tortfeasor from seeking apportionment from [a non-party] intentional tortfeasor. Moreover, any further extension of the exclusion would defeat the purpose of Article 16, which is to protect low-fault, “deep pocket” defendants from being fully liable pursuant to joint and several liability rules.¹²²

Chianese v. Meier involved allegations of inadequate building security.¹²³ The court held that the fact that an assailant had acted intentionally did not elevate the purely negligent behavior of the other actors to intentional conduct, thus entitling the defendant building owner and manager to Article 16 protection.¹²⁴ Accordingly, apportionment of damages for personal injuries is permissible between a negligent landlord and a nonparty intentional tortfeasor.¹²⁵

119. *Concepcion v. N.Y. City Health & Hosp. Corp.*, 729 N.Y.S.2d 478, 479 (App. Div. 2001).

120. *Id.*

121. *Id.*

122. *Id.* at 480; see *Roseboro v. N.Y. City Transit Auth.*, 729 N.Y.S.2d 472, 474-75 (App. Div. 2001) (finding that apportionment is available against non-party intentional tortfeasors); *Maria E. v. 599 West Assocs.*, 726 N.Y.S.2d 237, 242-43 (Sup. Ct. 2001) (providing pleading requirements of Article 16 apportionment).

123. *Chianese v. Meier*, 774 N.E.2d 722, 723 (N.Y. 2002).

124. *Id.* at 725-26.

125. See *id.* at 726; see also *N.X. v. Cabrini Med. Ctr.*, 228 N.Y. L.J., Oct. 28, 2002, at 25 (N.Y. Sup. Ct.).

**D. Intentional Act of Non-Party Tortfeasor Does Not Bring
Pure Negligence Action Within Section
1602(5) Exclusion**

Section 1602 excepts certain types of actions from the ambit of section 1601, including “actions requiring proof of intent.”¹²⁶ “This exception applies to prevent defendants who are found to have committed an intentional tort from invoking the benefits of section 1601.”¹²⁷ In *Chianese*, a tenant sued her landlord and building manager for negligence, alleging inadequate building security, after she was assaulted inside the building.¹²⁸ The attacker was later apprehended and convicted of a series of crimes, including the attack on the plaintiff.¹²⁹ A jury found the landlord and manager fifty percent responsible for the assault, and apportioned damages on that basis.¹³⁰ The plaintiff in *Chianese* argued that her negligence claim against defendants, because it necessarily involved an intentional act by her attacker, was also an “action requiring proof of intent,” thus precluding apportionment by defendants.¹³¹

“Because the plaintiff’s negligence claim is not an ‘action requiring proof of intent,’ section 1602(5), on its face, does not apply to preclude apportionment of liability.”¹³² The defendants’ liability, in *Chianese*, did not depend on proof of the attacker’s state of mind.¹³³ The plaintiff merely had to prove that “she was injured as a result of the defendants’ failure to provide adequate security on the premises.”¹³⁴ The mere fact “that a nonparty tortfeasor acted intentionally does not bring a pure negligence action within the scope of the exclusion.”¹³⁵

“While section 1602(5) forecloses intentional tortfeasors from seeking apportionment irrespective of the mental state of any other tortfeasors, section 1602(11) precludes apportionment with any parties found to have acted knowingly or intentionally and in concert.”¹³⁶ “The primary purpose of [section 1602](11) is . . . to pre-

126. *Chianese*, 774 N.E.2d at 724.

127. *Id.* at 724-25.

128. *Id.* at 723.

129. *Id.*

130. *Id.* at 724-25.

131. *Id.* at 725.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*; see *Roseboro v. N.Y. City Transit Auth.*, 729 N.Y.S.2d 472, 475 (App. Div. 2001); *Concepcion v. N.Y. City Health & Hosp. Corp.*, 729 N.Y.S.2d 478, 480 (App. Div. 2001); *Siler v. 146 Montague Assocs.*, 652 N.Y.S.2d 315, 321 (App. Div. 1997).

136. *Chianese*, 774 N.E.2d at 726.

vent apportionment among multiple intentional tortfeasors . . . when dividing liability among them would [place] them under the section 1601 [fifty percent guideline].”¹³⁷ This interpretation of section 1602(5) is consistent with the exception to apportionment set out in section 1602(11) and “does not render section 1602(11) duplicative.”¹³⁸

What little legislative history there is accords with the reading of section 1602(5) which indicates that Article 16 preserves joint and several liability for instances where a defendant performs acts are willfully or intentionally performed in concert with others.¹³⁹ Conversely, there is “no indication in the legislative history that section 1602(5) was intended to create what would amount to a broad exception to apportionment at the expense of the low-fault, merely negligent landowners and municipalities—the very parties article 16 intended to benefit.”¹⁴⁰

In *Chianese*, under the plaintiff’s proposed reading of the statute, the right of a low-fault defendant to benefit from apportionment:

would depend entirely on the nature of the culpability of the third-party tortfeasor. A negligent defendant could apportion liability with a negligent or reckless third-party tortfeasor, but not an intentional tortfeasor . . . Such a result is not only illogical but also inconsistent with the [legislative intent and] chief remedial purpose of article 16.¹⁴¹

The unequivocal language of CPLR section 1602(2)(iv) bespeaks that the legislature did not intend to create an exception to the apportionment rule. Section 1602(2)(iv) does not contain the precise language, explicitly present in other areas of CPLR section 1602, necessary to create an exception. CPLR section 1602(2)(iv) was formulated to simply preserve the principles of vicarious liability.

IV. MUNICIPAL VEHICLES ARE PROTECTED BY A RECKLESSNESS STANDARD WHILE ENGAGED IN WORK ON A HIGHWAY

The Court of Appeals recently confirmed that “recklessness” was the proper standard of care to apply to “hazard” vehicles, which are exempt from the rules of the road, pursuant to New

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*; *Rangolan v. County of Nassau*, 749 N.E.2d 178, 182 (N.Y. 2001).

141. *Chianese*, 774 N.E.2d at 726 (citations omitted).

York Vehicle and Traffic Law ("VTL") section 1103(b). At the same time, the court rejected the argument that such vehicles must be located in a designated "work area" in order to qualify for the hazard vehicle exemption.

In *Riley v. County of Broome and Wilson v. New York*, the Court of Appeals addressed two independent situations that involved injuries resulting from automobile collisions with a municipal street sweeper and snow plow respectively.¹⁴² The trial courts dismissed, and the Appellate Division affirmed both personal injury claims, finding that, under VTL section 1103(b), "all vehicles engaged in 'highway maintenance' are exempt from the rules of the road and subject . . . to [the higher] recklessness standard."¹⁴³

The Vehicle and Traffic Law section 117's definition of a "hazard vehicle" includes a municipal vehicle engaged in highway maintenance or ice and snow removal, where such operation involves the use of a public highway.¹⁴⁴ "Hazardous operation" is defined in VTL section 117-b as, "the operation, or parking, of a vehicle on or . . . adjacent to a public highway while such vehicle is actually engaged in an operation which would . . . interfere with the normal traffic flow"¹⁴⁵

Obviously, a certain "degree of risk . . . is inherent in travel on public highways."¹⁴⁶ Particular classes of vehicles are intended to reduce the risks involved in highway travel by maintaining the safety of roadways.¹⁴⁷ "While serving an important public function, however, [such] vehicles may themselves cause [certain] risks to [routine] motorists."¹⁴⁸

"At common law, all vehicles, including emergency vehicles, were held to an ordinary negligence standard."¹⁴⁹ The common law and various statutes also recognized that the level of care owed by emergency and roadwork vehicles must be tempered by the nature of their work, providing certain exceptions to the rules of the

142. *Riley v. County of Broome*, 742 N.E.2d 98, 99 (N.Y. 2000).

143. *Id.* at 100; *Kearns v. Piatt*, 716 N.Y.S.2d 418, 419 (App. Div. 2000) (applying the recklessness standard to a municipal truck applying sand and salt mixture to icy road); *Wilson v. State*, 703 N.Y.S.2d 848, 848-49 (App. Div. 2000) (affirming decision exempting snowplow plowing snow on a highway); *Gawelko v. State*, 710 N.Y.S.2d 762, 763-65 (Ct. Cl. 2000) (holding a snowplow that lost control was exempt).

144. *Riley*, 742 N.E.2d at 100.

145. *Id.* at 100 n.1 (quoting N.Y. VEH. & TRAF. LAW § 117-b (Consol. 1996)).

146. *Id.* at 100.

147. *Id.*

148. *Id.*

149. *Id.* at 101.

road for such vehicles.¹⁵⁰ “Nevertheless, the common law required that such vehicles . . . [act] with care and caution [proportional to] the purpose and necessity of the right.”¹⁵¹

Vehicle and Traffic Law section 1103(b) explicitly states that the rules of the road do not apply to vehicles “while actually engaged in work on a highway.”¹⁵² Section 1103(b) further states that such operators shall not be protected from the consequences of “reckless disregard for the safety of others.”¹⁵³

In *Bliss v. New York*,¹⁵⁴ the claimant impacted the rear of a New York State Thruway Authority (“NYSTA”) truck that was operating in reverse as part of a three truck crew dismantling a lane closure on a bridge.¹⁵⁵ The court in *Bliss* held that even though the state driver pled guilty to the VTL violation of unsafe backing, and may have failed to adhere to NYSTA’s regulations for operating a truck in reverse on a highway, his conduct did not rise to the level of recklessness required by section 1103(b).¹⁵⁶ “The recklessness standard requires more than a showing of lack of due care, which is associated with ordinary negligence,” such as a violation of an administrative regulation or traffic rule.¹⁵⁷

Section 1103(b) adds that VTL section 1202(a), “which regulates stopping, standing, and parking, does not apply to hazard vehicles while actually engaged in hazardous operation on . . . the highway, but shall apply to such vehicles when traveling to or from such hazardous operation.”¹⁵⁸ “Similarly, [VTL section] 1104 exempts ‘emergency vehicles,’ such as ambulances, police . . . and fire vehicles, [from the rules of the road while] engaged in emergency operations, subject to [certain] conditions.”¹⁵⁹

The plain language of these statutes clearly states that vehicles actually engaged in work on a highway, similar to emergency vehicles engaged in emergency operations, are exempt from the rules of the road, regardless of their classification.¹⁶⁰ The statute does not create a distinction between hazard vehicles and work vehicles,

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. 686 N.Y.S.2d 556 (Ct. Cl. 1998).

155. *Id.* at 558.

156. *Id.* at 560.

157. *Id.*

158. *Riley v. County of Broome*, 742 N.E.2d 98, 101 (N.Y. 2000).

159. *Id.*

160. *Id.*

nor does it deny “hazard vehicles” the special protection given to all vehicles actually engaged in roadwork.¹⁶¹

“The primary consideration of courts in interpreting a statute is to ascertain and give effect to the intention of the legislature. . . . [T]he words of the statute are the best evidence of the Legislature’s intent . . . [and] unambiguous language is alone determinative.”¹⁶² The history of section 1103(b) evidences that the legislature intended to create an expansive exemption from the rules of the road for all vehicles engaged in highway construction and maintenance, regardless of their classification.

Thus, the exemption [focuses] on the nature of the work being performed, not on the nature of the vehicle employed for the work.

Further, the legislative history shows that the reference to “hazard vehicles” in section 1103(b) is wholly unrelated to the provision excusing vehicles engaged in road work from the rules of the road. Notably, the original version of section 1103(b) exempted vehicles “engaged in work on a highway” from the rules of the road, [but] *did* not contain any separate provisions concerning hazard vehicles. In 1970, the legislature amended the Vehicle and Traffic Law to [define] the “hazard class” of vehicles . . . and amend[ed] section 1103(b) to exempt hazard vehicles from the standing, stopping and parking regulations.¹⁶³

The history of the amendment demonstrates that it was intended to distinguish the classification of different flashing colored lights on various vehicles, but was not intended to curtail the exemption for any vehicles.¹⁶⁴

Section 1103(b) does not require that a vehicle be located in a designated “work area” in order to receive the protection.¹⁶⁵ The VTL section that defines work area was not enacted until long after section 1103(b) was adopted. “Thus, there is no credible argument that the legislature only had designated work areas in mind when it adopted section 1103(b).”¹⁶⁶

Originally, section 1103(b) provided vehicles actually engaged in work on a highway with an unqualified exemption from the rules of the road.¹⁶⁷ In 1974, the legislature amended section 1103(b), ad-

161. *Id.* at 102.

162. *Id.*

163. *Id.* at 102- 03 (citations omitted).

164. *Id.*

165. *Id.* at 105.

166. *Id.*

167. *Id.* at 103.

ding that vehicles actually engaged in work on a highway must proceed with due regard for the safety of others and are not protected “from the consequences of their reckless disregard for the safety of others.”¹⁶⁸ The legislative history explains that the “minimum standard of care” was designed to curtail the outright exemption of vehicles engaged in road work from the rules of the road.¹⁶⁹

In *Saarinen v. Kerr*, the Court of Appeals held that VTL section 1104(e), which contains identical language requiring emergency vehicles to act with “due regard for the safety of all persons,” imposes a standard of reckless disregard.¹⁷⁰ Specifically, under section 1104(e), a plaintiff seeking to recover for injuries caused by an emergency vehicle must show that “the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow and has done so with conscious indifference to the outcome.”¹⁷¹ Section 1103(b) imposes the same recklessness standard on vehicles actually engaged in work on a highway.¹⁷² The legislature’s specific reference to reckless disregard would be unnecessary and, in fact, inexplicable if the conventional criterion for negligence, reasonable care under the circumstances, were the intended standard.

In *Saarinen*, a driver was struck by a police vehicle with its emergency light activated that was engaged in a brief pursuit of a vehicle that was driving recklessly.¹⁷³ The common law and VTL section 1104 recognize that emergency and police vehicles are frequently faced with emergency situations.¹⁷⁴ The court in *Saarinen* reasoned that any standard other than a recklessness standard would result in judicial second-guessing of split second decisions made by emergency personnel in the midst of highly pressurized situations and could deter trained emergency personnel from acting decisively to protect or save human life or property.¹⁷⁵

As a general principle of statutory construction, when a word is used in a statute, and subsequently used in a statute concerning the same topic, it is understood to possess the same meaning for each

168. *Id.*

169. *Id.*

170. *Saarinen v. Kerr*, 644 N.E.2d 988, 992-93 (N.Y. 1994).

171. *Id.* at 991 (citing PROSSER & KEETON ON TORTS § 34, at 213 (W. Page Keeton et al. eds., 5th ed. 1984)).

172. *See Riley*, 742 N.E.2d at 102.

173. *Saarinen*, 644 N.E.2d at 989.

174. *Id.* at 991.

175. *Id.* at 992.

application.¹⁷⁶ The “history of section 1103(b) confirms that the Legislature intended to subject vehicles engaged in road work to the same standard of care as emergency vehicles.”¹⁷⁷ In *McDonald*, the court stated that although the snowplow operator was clearly negligent in failing to observe the claimants’ vehicle before initiating a lane change, the “improvident determination . . . did not rise to a level of a reckless disregard for the safety of others so as to warrant a recovery by claimants.”¹⁷⁸

Several judges have found it difficult to accept the prevailing interpretation that gives all hazard vehicles more expansive section 1103(b) exemption, regardless of whether in a designated work area or performing their jobs.¹⁷⁹ According to the Court in *Gawelko*, rural letter carriers and truck drivers appear to benefit from greater protection than ambulance drivers and police.¹⁸⁰ Although the court indicated that this result defied logic and plain common sense, “the most fundamental and overriding rule of statutory construction is that courts must give effect to the intent of the legislature.”¹⁸¹

In *Cottingham*, the court held that the hazard vehicle exception should be narrowly construed to a limited “work area,” as defined by VTL section 160.¹⁸² The court concluded that there is no compelling reason or explicit legislative intent to extend the standard of ordinary negligence to reckless disregard for the operation of hazardous vehicles.¹⁸³ The court in *Cottingham* stated that it would be absurd to provide drivers of hazard vehicles greater protection than drivers of police vehicles, concluding that VTL sections 1103 and 1104 merely created four distinct categories of vehicles that each receive varying degrees of protection.¹⁸⁴

The protection provided to emergency vehicles under section 1104(e) “represents a recognition that the duties of emergency personnel often bring them into conflict with the rules that are intended to regulate [general] conduct.”¹⁸⁵ The court recognized that the importance of public safety and law enforcement justifies a

176. *Riley*, 742 N.E.2d at 104.

177. *Id.*

178. *McDonald v. State*, 673 N.Y.S.2d 512, 520 (Ct. Cl. 1998).

179. *Gawelko v. State*, 710 N.Y.S.2d 762, 764 (Ct. Cl. 2000); *Cottingham v. State*, 701 N.Y.S.2d 290, 292, 298 (Ct. Cl. 1999).

180. *Gawelko*, 710 N.Y.S.2d at 764.

181. *Id.*

182. *Cottingham*, 701 N.Y.S.2d at 298-99.

183. *Id.* at 299.

184. *Id.* at 300.

185. *Riley v. County of Broome*, 742 N.E.2d 98, 104-05 (N.Y. 2000).

qualified privilege afforded to emergency personnel where necessary to conduct their vital responsibilities that “will inevitably increase the risk of harm to innocent motorists and pedestrians.”¹⁸⁶ Although it is unclear that the increased risk to the general public is similarly justified for all non-emergency vehicles engaged in road work, the legislature has clearly established that vehicles engaged in road work enjoy the same benefit of the reduced standard of care as emergency vehicles.¹⁸⁷ Any change in that standard, therefore, must come from the legislature.¹⁸⁸

A. Emergency Vehicles Are Entitled to a Reckless Disregard Standard, Even During Non-Emergency Operations

In *Criscione v. City of New York*,¹⁸⁹ the Court of Appeals held that a police officer who was driving a patrol car in response to a *non-emergency* dispatch call to investigate a family dispute was engaged in the “emergency operation” of a vehicle as defined in New York State Vehicle and Traffic Law section 114-b.¹⁹⁰ Consequently, his actions should not have been measured by ordinary negligence standards, but rather by the “reckless disregard” standard of VTL section 1104(e).¹⁹¹ Whether the police officer violated a New York City Police Department policy in responding to that type of call would be an important, but not dispositive, factor in determining whether he had acted recklessly.¹⁹²

Plaintiff and defendant, both New York City police officers, were traveling in a police radio patrol car during a tour of duty.¹⁹³ Defendant officer was the driver of the vehicle, while plaintiff sat in the front passenger seat communicating with the police dispatcher and writing down the calls received.¹⁹⁴ While traveling to the location of a complaint, the patrol car entered an intersection and collided with a civilian vehicle, causing injuries to the plaintiff.¹⁹⁵

During the trial, the defendant officer testified that, prior to the accident, he and the plaintiff received a “non-crime” dispute radio

186. *Id.* at 105.

187. *Id.*

188. *Id.*

189. 762 N.E.2d 342 (N.Y. 2001).

190. *Id.* at 345.

191. *Id.*

192. *Id.*

193. *Id.* at 343.

194. *Id.*

195. *Id.*

call from a dispatcher.¹⁹⁶ “In accordance with departmental policy regarding non-criminal calls, the defendant testified that he did not increase the speed of the vehicle or activate the siren or turret lights while driving to the scene, because the call did not fit the criteria for an emergency response.”¹⁹⁷

The court in *Criscione* held that the driver of an “authorized emergency vehicle” engaged in an “emergency operation” is exempt from certain rules of the road under VTL section 1104.¹⁹⁸ Vehicle and Traffic Law section 101 specifically designates a police vehicle as an “authorized emergency vehicle.”¹⁹⁹ Additionally, included in the VTL section 114-b description of “emergency operation” of a vehicle is the operation of an authorized emergency vehicle, while responding to a police call.²⁰⁰ This qualified privilege, however, does not relieve the driver “from the duty to drive with due regard for the safety of all persons,” nor shall it protect the driver from the consequences of his “reckless disregard for the safety of others.”²⁰¹

The statutory analysis of the relevant VTL sections begins with determining the plain meaning of each word of the statutory provisions.²⁰² Although section 114-b does not define the phrase “police call,” the court in *Criscione* determined that a radio call to officers on patrol by a police dispatcher regarding a 911 call falls squarely within the plain meaning of the term “police call.”²⁰³

The court further held that there is no evidence of any “legislative intent to vary the definition of ‘emergency operation’ based on individual police department incident classifications,” including, but not limited to, criminal, non-criminal, or emergency.²⁰⁴ The requirements of VTL section 114-b were met in *Criscione* “as it is undisputed that [the Defendant] was operating a patrol vehicle while responding to a police dispatch to investigate a 911 call when he was involved in the traffic accident.”²⁰⁵ Therefore, the court

196. *Id.*

197. *Id.*

198. *Id.* at 344.

199. *Id.*

200. *Id.*

201. N.Y. VEH. & TRAF. LAW § 1104(e) (Consol. 2003); *Criscione*, 762 N.E.2d at 344.

202. *Criscione*, 762 N.E.2d at 345.

203. *Id.*

204. *Id.*

205. *Id.*

held that as a matter of law, the defendant was involved in an “emergency operation” at the time of the accident.²⁰⁶

“Given the legislative determination that a police dispatch call is an ‘emergency operation,’ it is irrelevant whether the officers believed that the call was an emergency or how the Police Department categorized this type of call.”²⁰⁷ “Whether [the defendant officer] violated a New York City Police Department policy in responding to this type of call would [merely] be an important, although not dispositive, factor in determining whether [he] had acted recklessly.”²⁰⁸ The defendant was involved in an “emergency operation” of an “authorized emergency vehicle” as a matter of law, and thus, pursuant to VTL section 1104(e) was entitled to a qualified privilege to disregard the ordinary rules of prudent and responsible driving, subject to a “reckless disregard” standard of liability.²⁰⁹

V. GOVERNMENTAL IMMUNITY FOR DISCRETIONARY ACTIONS UNLESS A SPECIAL RELATIONSHIP IS PROVEN

The State is protected by immunity for actions or decisions requiring the exercise of discretion. The Appellate Division recently confirmed that negligent performance of a governmental function, such as the protection and safety of the public, cannot result in liability without the demonstration of a “special relationship” between the injured party and the State.²¹⁰ In order for liability to attach, the plaintiff must demonstrate that the State, through direct

206. *Id.*

207. *Id.*

208. *Id.* (citing *Saarinén v. Kerr*, 644 N.E.2d 988, 992-93 (1994)).

209. *Id.*

210. *Sebastian v. State*, 720 N.E.2d 878, 880 (N.Y. 1999); *De La Paz v. City of New York*, 743 N.Y.S.2d 116, 117 (App. Div. 2002); *Clark v. Town of Ticonderoga*, 737 N.Y.S.2d 412, 414 (App. Div. 2002); *Respass v. City of New York*, 733 N.Y.S.2d 210, 211 (App. Div. 2001); *Rogers v. State*, 732 N.Y.S.2d 805, 806 (App. Div. 2001); *Miller v. State*, 716 N.Y.S.2d 762, 763 (App. Div. 2000); *D’Avolio v. Prado*, 715 N.Y.S.2d 827, 829 (App. Div. 2000); *Pfaler v. Town of Friendship*, 705 N.Y.S.2d 772, 772 (App. Div. 2000); *McEnaney v. State*, 700 N.Y.S.2d 258, 260-61 (App. Div. 1999); *Haggerty v. Diamond*, 673 N.Y.S.2d 331, 332 (App. Div. 1998); *Clinger v. N.Y. City Transit Auth.*, 650 N.E.2d 855, 856 (1995); *Mohamed v. Town of Greenbush*, 646 N.Y.S.2d 424, 425 (App. Div. 1996); *Gonzalez v. County of Suffolk*, 643 N.Y.S.2d 651, 652 (App. Div. 1996); *Cardona v. County of Albany*, 728 N.Y.S.2d 355, 358 (Sup. Ct. 2001). Similarly, absent a special relationship, liability cannot be imposed on a governmental agency for failure to enforce a statute or regulation. *Lindsay v. N.Y. City Hous. Auth.*, No. 99 Civ. 3315, 1999 U.S. Dist. LEXIS 1893, at *1 (E.D.N.Y. Feb. 24, 1999); *Gonzalez v. Barbieri*, 705 N.Y.S.2d 399, 400 (App. Div. 2000); *Rickson v. Town of Schuyler Falls*, 694 N.Y.S.2d 213, 215 (App. Div. 1999); *Weiss v. City of New York*, 688 N.Y.S.2d 533, 533 (App. Div. 1999); *Joslyn v. Village of Sylvan Beach*, 682 N.Y.S.2d 781, 781 (App.

personal contact, assumed an affirmative duty to act on the injured party's personal behalf, which was conveyed to the injured party and subsequently relied upon.²¹¹ The critical element of the special relationship exception, and the one most difficult to prove, is the plaintiff's justifiable reliance on the government's assurances.²¹² The plaintiff must prove that the defendant's conduct actually lulled her into a false sense of security, caused her to either relax her vigilance or forego other means of protection, and thereby placed her in a worse position than she would have been in otherwise.²¹³

The State has always maintained its immunity for governmental actions requiring expert judgment or the exercise of discretion.²¹⁴ "This immunity . . . is absolute when the action involves the conscious exercise of discretion of a judicial or quasi-judicial nature."²¹⁵ This absolute immunity "reflects the value judgment that the public interest in having officials free to exercise their discretion unhampered by the fear of retaliatory lawsuits outweighs the benefits to be had from imposing liability."²¹⁶

"It is a well-settled principle that an action of a governmental employee . . . is [protected by] . . . immunity . . . if the functions and duties of the . . . particular position . . . inherently entail[s] the exercise of . . . discretion and judgment."²¹⁷ "Discretion is indicated if the powers are to be executed or withheld according to a governmental agent's own view of what is necessary and proper [under the circumstances]."²¹⁸ Whether immunity applies to a discretionary act depends on whether the position entails making decisions based on an "exercise of reasoned judgment which could typically produce different acceptable results."²¹⁹ Judicial and quasi-judicial acts are even protected when the decision and results are incorrect or tainted by improper motives.²²⁰ To hold otherwise would sub-

Div. 1999); *Shahin v. City of Yonkers*, 678 N.Y.S.2d 668, 669 (App. Div. 1999); *Urbiera v. Hous. Now Co.*, 709 N.Y.S.2d 910, 913 (Sup. Ct. 2000).

211. See cases cited *supra* note 210.

212. See cases cited *supra* note 210.

213. See cases cited *supra* note 210.

214. *Arteaga v. State*, 527 N.E.2d 1194, 1196 (N.Y. 1988).

215. *Id.*

216. *Id.*; *Mosher-Simons v. County of Allegany*, 783 N.E.2d 509, 512-13 (N.Y. 2002); *Davis v. State*, 691 N.Y.S.2d 668, 671 (App. Div. 1999).

217. *Davis*, 691 N.Y.S.2d at 671 (internal citations omitted).

218. *Id.* (internal citations omitted).

219. *Id.*

220. *Tarter v. State*, 503 N.E.2d 84, 86-87 (N.Y. 1986); *Semkus v. State*, 708 N.Y.S.2d 288, 289 (App. Div. 2000).

ject the local and state municipalities to massive liability, placing an impossible burden on local and state government.

For example, determinations pertaining to parole and its revocation are strictly sovereign and quasi-judicial in nature and accordingly, the State, in making such determinations, is absolutely immune from tort liability.²²¹ The courts have also applied the special duty and governmental function analysis in dismissing claims by victims of escaped prisoners, holding that the duty to safeguard prisoners was a governmental duty owed to the public at large, not to individuals.²²²

A. Special Relationship Required to Overcome Governmental Immunity

Unless *precise assurances were made to the specific individual*, there can be no liability for the State's performance of a governmental function.²²³ In *Clark*, the plaintiff sued to recover for injuries sustained by the decedent, which she claimed resulted from the failure of the town police department to provide her with adequate police protection from her estranged husband.²²⁴ In an effort to avoid the operation of the general rule that a municipality may not be held liable for injuries resulting from a failure to provide police protection, the plaintiff asserted the existence of a "special relationship."²²⁵ In order to establish a special relationship the plaintiff must prove: 1) an assumption by the municipality of an affirmative duty to act on her behalf; 2) knowledge on the part of the municipality's agents that inaction could lead to harm; 3) direct contact between the parties; and 4) the plaintiff's justifiable reliance on the assurances.²²⁶

In *Clark*, after a series of threatening events involving the plaintiff and her estranged husband, criminal charges were filed and a temporary protection order was issued.²²⁷ When an officer delivered a copy of the temporary order of protection to plaintiff, the officer assured the plaintiff that the police would "keep an eye on"

221. *Tarter*, 503 N.E.2d at 85; *Semkus*, 708 N.Y.S.2d at 289.

222. *McEnaney v. State*, 700 N.Y.S.2d 258, 260 (App. Div. 1999); *Cossano v. State*, 514 N.Y.S.2d 431, 432 (App. Div. 1987).

223. *D'Avolio v. Prado*, 715 N.Y.S.2d 827, 829 (App. Div. 2000).

224. *Clark v. Town of Ticonderoga*, 737 N.Y.S.2d 412, 413 (App. Div. 2002)

225. *Id.* at 413-14; *Grieshaber v. City of Albany*, 720 N.Y.S.2d 214, 215 (App. Div. 2001).

226. *Clark*, 737 N.Y.S.2d at 414; *Greishaber*, 720 N.Y.S.2d at 215; *D'Avolio*, 715 N.Y.S.2d at 829.

227. *Clark*, 737 N.Y.S.2d at 414.

her.²²⁸ Subsequently, the plaintiff's husband confronted her and was charged with violating the terms of the temporary order of protection, but was released on his own recognizance.²²⁹ The plaintiff later saw her husband in the area, but she did not call the police because she realized that the police could not do anything at that time.²³⁰ Tragically, her husband arrived shortly thereafter and repeatedly stabbed the plaintiff.²³¹

B. Justifiable Reliance Necessary for Special Relationship

Although the plaintiff in *Clark* was able to prove that a special relationship existed, she was unable to prove that she had justifiably relied on the town's undertaking.²³² "Providing the essential causative link between the special duty assumed by the municipality and the alleged injury, the justifiable reliance requirement goes to the core of the special relationship exception."²³³

"The 'reliance' that is required is [more than a mere] hope or . . . belief that the defendants could provide her with adequate . . . police protection."²³⁴ When the plaintiff's husband was released on his own recognizance, the plaintiff was aware that he was not in custody and that "the police were [unable] to take any [further] action against [him] unless he further violated the order of protection or committed an independent crime."²³⁵

The governmental function doctrine is based primarily upon separation of powers principles.²³⁶ The legislative and executive branches of government, rather than the judiciary, have the unique responsibility to allocate scarce public resources.²³⁷ Second-guessing of the discretionary priorities set and resources allocated by the other two branches of government is not appropriate.²³⁸ "That the function has traditionally been assumed by police rather than by

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.* at 415.

233. *Id.*; see *Greishaber v. City of Albany*, 720 N.Y.S.2d 214, 216 (App. Div. 2001).

234. *Clark*, 737 N.Y.S.2d at 415.

235. *Id.*

236. See *Kircher v. City of Jamestown*, 543 N.E.2d 443, 445-46 (N.Y. 1999).

237. *Id.*; *Greishaber*, 720 N.Y.S.2d at 215.

238. *Balsam v. Delma Eng'g Corp.*, 688 N.E.2d 487, 488-89 (N.E. 1997); *Tarter v. State*, 503 N.E.2d 84, 86-87 (N.Y. 1986); *Weiner v. Metro. Transp. Auth.*, 433 N.E.2d 124, 127 (N.Y. 1982).

private actors is a tell-tale sign that the conduct is not proprietary in nature.”²³⁹

The plaintiff must demonstrate that the State, through direct personal contact, assumed an affirmative duty to act on the injured party’s personal behalf, which was conveyed to the injured party, and subsequently relied upon.²⁴⁰ The most critical element of the special relationship is the injured party’s justifiable reliance on the government’s assurances.²⁴¹

**VI. COMPLAINT LETTERS OR CONFLICTING EXPERT OPINIONS
REGARDING THE DECISION TO INSTALL A TRAFFIC
CONTROL DEVICE DO NOT AFFECT A MUNICIPALITY’S
QUALIFIED IMMUNITY**

Recently the Court of Appeals confirmed that highway planning decisions are purely discretionary governmental functions, which are completely protected from liability by qualified immunity.²⁴² The court reiterated that a recommendation from a private engineering firm that a traffic signal be installed at a particular location does not create liability for a municipality.²⁴³ “Something more than a choice between conflicting opinions of experts is required before a governmental body may be held liable for negligently performing its traffic planning function.”²⁴⁴ The court in *Affleck* went further to hold that letters of complaint to a municipality regarding the necessity of installing a traffic control device do not alter the affect of the judgement by an authorized traffic planning authority.²⁴⁵

It is well settled that a municipality has a non-delegable duty to maintain its roadways in a reasonably safe condition.²⁴⁶

239. *Balsam*, 688 N.E.2d at 489.

240. *Clark*, 737 N.Y.S.2d at 414.

241. *Id.* at 415

242. *Affleck v. Buckley*, 758 N.E.2d 651, 652-54 (N.Y. 2001); *McCabe v. Town of Brookhaven*, 735 N.Y.S.2d 608, 609 (App. Div. 2001); *Quigley v. Goldfine*, 714 N.Y.S.2d 733, 734 (App. Div. 2000); *Schuster v. Town of Hempstead*, 692 N.Y.S.2d 721, 722 (App. Div. 1999); *Onorato v. City of New York*, 684 N.Y.S.2d 637, 638 (App. Div. 1999); *O’Brien v. City of New York*, 647 N.Y.S.2d 561, 562 (App. Div. 1996).

243. *Affleck*, 758 N.E.2d at 654.

244. *Id.*

245. *Id.* at 653

246. *Vizzini v. State*, 717 N.Y.S.2d 415, 416 (App. Div. 2000); *Ciasullo v. Town of Greenville*, 712 N.Y.S.2d 579, 581 (App. Div. 2000); *Ring v. State*, 705 N.Y.S.2d 427, 427 (App. Div. 2000); *Schuster v. Town of Hempstead*, 692 N.Y.S.2d 721, 722 (App. Div. 1999); *Zecca v. State*, 669 N.Y.S.2d 413, 414 (App. Div. 1998).

It is [similarly] well [established] that a municipality is not an insurer of the safety of its roadways. The design, construction and maintenance of public highways is entrusted to the sound discretion of municipal authorities and, so long as a highway may be said to be reasonably safe for people who obey the rules of the road, the duty imposed upon the municipality is satisfied.²⁴⁷

A governmental entity may not be liable for highway planning decisions unless its study of traffic conditions is “plainly inadequate or there is no reasonable basis for its plan.”²⁴⁸ Additionally, “the State is not required to undertake expensive reconstruction of highways [merely] because the [highway] design standards have been [amended or] upgraded since the time of the original construction [of a highway].”²⁴⁹

If a municipality determines that a traffic control device is necessary to remedy a dangerous condition, the municipality should act within a reasonable time frame to correct the condition.²⁵⁰ If there is an unjustifiable delay in implementing a remedial plan by the municipality, then the municipality may be subject to liability.²⁵¹ Even assuming that the State was negligent in highway design or maintenance, the State will not be liable for an accident unless its negligence was the proximate cause of the accident.²⁵²

The *Affleck* case involved an automobile accident where plaintiff’s decedents were struck by an oncoming car, while attempting to make a left-hand turn into an entrance to a shopping center.²⁵³ “In addition to instituting an action against the drivers and owners of the other cars involved in the accident, plaintiff . . . administrator . . . sued the County . . . alleging that the County negligently failed to conduct traffic studies of the area [in question], relying instead on a private[] . . . study.”²⁵⁴ The plaintiff further asserted

247. *Ciasullo*, 712 N.Y.S.2d at 581 (internal citations omitted).

248. *Affleck*, 758 N.E.2d at 653 (internal citations omitted); see *McCabe v. Town of Brookhaven*, 735 N.Y.S.2d 608, 609 (App. Div. 2001); *Quigley v. Goldfine*, 714 N.Y.S.2d 733, 734 (App. Div. 2000); *Romeo v. State*, 709 N.Y.S.2d 783, 784 (App. Div. 2000); *Light v. State*, 672 N.Y.S.2d 543, 544 (App. Div. 1998).

249. *Vizzini*, 717 N.Y.S.2d at 417.

250. See *Ring*, 705 N.Y.S.2d at 428-29.

251. See *id.*

252. *Hamilton v. State*, 716 N.Y.S.2d 529, 530 (App. Div. 2000); see *Ring*, 705 N.Y.S.2d at 428; *Dumond v. State*, 689 N.Y.S.2d 898, 899 (App. Div. 1999).

253. *Affleck*, 758 N.E.2d at 652-53.

254. *Id.*

that the county's decision not to install a traffic signal at the intersection in question was unreasonable.²⁵⁵

[I]n response to customer reports of difficulty exiting the parking lot, [the shopping center commissioned a private engineer] to conduct a study of traffic conditions at the intersection. Approximately nine months before the accident, the [private engineer] presented the study to the County with its recommendation that a traffic light be installed. Although the [private engineer's] report focused primarily on the difficulties faced by drivers attempting to exit the [shopping center's] parking lot, it also analyzed traffic conditions for drivers entering the parking lot from [the street where the accident occurred]. The [engineer's] report indicated that, at all times of the day, conditions for drivers making left-hand turns into the parking lot were within acceptable parameters as set by the Federal Highway Administration of the Department of Transportation.

According to [undisputed] affidavits, the County relied on the [private] report, as well as its own [independent] studies of traffic conditions at the intersection, to determine [that] a traffic signal [at the intersection was unwarranted].²⁵⁶

The county did, however, take remedial measures to improve visibility for drivers exiting the driveway and installed warning signs for drivers approaching the driveway.²⁵⁷ The court in *Affleck* held that the county adequately examined the need for a traffic signal.

The court in *Affleck* held that neither the letters urging the county to install a signal nor the recommendation by the private engineer that one be installed raises an issue of fact concerning the reasonableness of the county's determination.²⁵⁸ "[Although] the letters may have alerted the county to a situation warranting study, [such letters] do not substitute for, nor do they cast doubt upon, the considered determination by a duly authorized traffic planning authority."²⁵⁹

"Something more than a mere choice between conflicting [expert] opinions is required before the State [or one of its agencies] may be charged with a failure [of] its duty to plan highways for the safety of the traveling public."²⁶⁰ The plaintiff must show not

255. *Id.*

256. *Id.* at 653.

257. *Id.*

258. *Id.* at 653-54.

259. *Id.*

260. *Affleck*, 758 N.E.2d at 653-54; *McCabe v. Town of Brookhaven*, 735 N.Y.S.2d 608, 609 (App. Div. 2001); *Romeo v. State*, 709 N.Y.S.2d 783, 785 (App. Div. 2000) (quoting *Weiss v. Fote*, 200 N.Y.S.2d 409, 415 (N.Y. 1960)); *Chary v. State*, 696

merely that another option was available but also that the plan adopted lacked a reasonable basis.²⁶¹ Strong public policy considerations warrant that the qualified immunity doctrine shall be applied in circumstances where a governmental body has invoked the expertise of qualified employees.²⁶²

VII. LIABILITY TO THIRD PARTY PURSUANT TO A CONTRACT

On two separate occasions, the Court of Appeals recently addressed whether a contract can result in liability in tort to a third party. Generally, a contractual obligation standing alone will not give rise to tort liability to a third party. The court has recognized, however, three distinct exceptions where a party who enters into a contract to render services may assume a duty of care to persons outside the contract. A party to a contract may be liable to third persons where: (1) the contracting party creates or exacerbates a harmful condition or launches a force or instrument of harm; (2) the plaintiff detrimentally and reasonably relies on the continued performance of the contracting parties' duties; or (3) the contracting party completely assumes the other party's duty to maintain the premises safety.²⁶³

A. *Espinal v. Melville Snow Contractors*

In *Espinal v. Melville Snow Contractors*,²⁶⁴ "the plaintiff brought a personal injury action against the defendant, a company that entered into a snow removal contract with a property owner."²⁶⁵ The plaintiff alleged that she slipped and fell in the parking lot owned by her employer, due to an icy condition created by negligent snow removal by the defendant.²⁶⁶

Initially, the court indicated that a finding of negligence must be based upon the breach of a duty.²⁶⁷ "[A] threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party."²⁶⁸ In *Espinal*, the issue was whether any duty ran

N.Y.S.2d 331, 332 (App. Div. 1999); *Light v. State*, 672 N.Y.S.2d 543, 544 (App. Div. 1998); *Monfiston v. County of Suffolk*, 670 N.Y.S.2d 53, 54 (App. Div. 1998).

261. *Affleck*, 758 N.E.2d at 652-53.

262. *Romeo*, 709 N.Y.S.2d at 785.

263. *Church v. Callanan Indus., Inc.*, 782 N.E.2d 50, 53 (N.Y. 2002); *Espinal v. Melville Snow Contractors*, 773 N.E.2d 485, 488 (N.Y. 2002).

264. *Espinal*, 773 N.E.2d at 485.

265. *Id.* at 486.

266. *Id.*

267. *Id.* at 487.

268. *Id.*; *Darby v. Compagnie Nat'l Air Fr.*, 753 N.E.2d 160, 162-63 (N.Y. 2001).

from the contractor to the plaintiff, given that the snow removal contract was with the property owner.²⁶⁹ “The existence and scope of a duty is a question of law requiring courts to balance . . . competing public policy considerations.”²⁷⁰

“[A] contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party.”²⁷¹ “Imposing [tort] liability under such circumstances could render contracting parties liable in tort to an indefinite number of potential [plaintiffs].”²⁷²

The court in *Espinal*, discussed the decisions in *H.R. Moch Co. v. Rensselaer Water Co.*,²⁷³ *Eaves Brooks Costume Co. v. Y.B.H. Realty Corp.*,²⁷⁴ and *Palka v. Servicemaster Management Services Corp.*,²⁷⁵ which identify contractual situations involving possible tort liability to third persons.²⁷⁶ In *Moch*:

the defendant entered into a contract with the City of Rensselaer to supply water to the City for various purposes, including water at the appropriate pressure for fire hydrants. A building caught fire and, because the defendant allegedly failed to supply sufficient water pressure to the hydrants, the fire spread and destroyed the plaintiff's warehouse. Although the contract was valid and enforceable between the city and the defendant . . . the contract was not intended to make the defendant answerable to anyone who might be harmed as a result of the defendant's alleged breach. Because the plaintiff company was not a third-party beneficiary, it could not sue for breach of contract . . . [or tort]. ‘Liability would be unduly and indeed indefinitely extended by this enlargement of the zone of duty.’”²⁷⁷

Ultimately, the court in *Moch* held that tort liability to a third person may arise where the alleged wrongdoer launched a force or instrument of harm.²⁷⁸

269. *Espinal*, 773 N.E.2d at 487.

270. *Id.*

271. *Id.* (internal citations omitted).

272. *Id.* at 487 (citing *H.R. Moch Co. v. Rensselaer Water Co.*, 158 N.E. 896, 898-99 (N.Y. 1928)).

273. 158 N.E. at 896.

274. 556 N.E.2d 1093 (N.Y. 1990).

275. 634 N.E.2d 189 (N.Y. 1994).

276. *Espinal*, 773 N.E.2d at 487.

277. *Id.* (quoting *Moch*, 158 N.E. at 896).

278. *Id.* at 487-88.

In *Eaves Brooks*, the court held that detrimental reliance is another basis for a contractor's liability in tort to third parties.²⁷⁹ In *Eaves Brooks*:

a commercial tenant sought to recover for property damage sustained when a sprinkler system malfunctioned and flooded the premises. The tenant sued the companies that were under contract with the property owner to inspect and maintain the sprinkler system. For policy reasons, [the court] refused to extend liability to encompass the defendant companies, noting that the building owners were in a better position to insure against loss.²⁸⁰

The court in *Eaves Brooks* held that tort liability may arise where performance of contractual obligations has induced detrimental reliance on continued performance and the defendant's failure to perform those obligations causes an injury to the plaintiff.²⁸¹

In *Palka*, the court considered:

whether a maintenance company under contract to provide preventive maintenance services to a hospital assumed a duty of care to the plaintiff, a nurse who was injured when a wall-mounted fan fell on her as she was tending to a patient. The contract between the parties was "comprehensive and exclusive" and required the maintenance company to inspect, repair and maintain the facilities, and to train and supervise all support service personnel. The company's obligation to the hospital was so [comprehensive] that it entirely displaced the hospital in carrying out maintenance duties.²⁸²

Accordingly, the court held that the "contracting provider owed a duty to non-contracting individuals reasonably within the zone and contemplation of the intended safety services, including the plaintiff."²⁸³

By the express terms of the contract, the snow removal company was obligated to plow only when the snow accumulation had ended and exceeded three inches.²⁸⁴ In addition, the company agreed that upon landowner's request, it would spread a mixture of salt and sand on certain areas of the property.²⁸⁵ As for snow removal, the company contracted to plow during the late evening and early

279. *Id.* at 488.

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.* at 487-89.

285. *Id.* at 489.

morning hours, and not until all accumulations have ceased, on a one time plowing per snowfall basis.²⁸⁶

This contractual undertaking was not “comprehensive and exclusive” property maintenance.²⁸⁷ The snow removal company “did not entirely absorb [the landowner’s duty] to maintain the premises safely. Indeed, the contract stated that ‘it is the responsibility of the property manager or owner to inspect the property and decide whether an icy condition warrants application[] of salt-sand. . . .’”²⁸⁸

Pursuant to the contract, the owner was required to communicate any defect in performance to the contractor immediately.²⁸⁹

Although [the company] undertook to provide snow removal services under specific circumstances, [the landlord] . . . retained its . . . duty to inspect and safely maintain the premises. [The company] was under no obligation to monitor the weather to see if melting and re-freezing would create an icy condition.²⁹⁰

The plaintiff in *Espinal* failed to allege detrimental reliance on the company’s continued performance of its contractual obligations.²⁹¹ “[A] defendant who undertakes to render services and then negligently creates or exacerbates a dangerous condition may be liable for any resulting injury.”²⁹² The snow removal company, however, simply cleared the snow as required by the contract.²⁹³ “Plaintiff’s fall on the ice was not the result of [the company] having launched a force or instrument of harm.”²⁹⁴ By merely plowing the snow, [the company] cannot be said to have created or exacerbated a dangerous condition.”²⁹⁵

Because the mere plowing of snow by an outside contractor did not rise to the level of any of the specific exceptions, the defendant owed no duty to the plaintiff and therefore cannot be held liable in tort.²⁹⁶

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.* (internal quotations omitted).

296. *Id.*

B. *Church v. Callanan Industries, Inc.*

In *Church*, an infant plaintiff received catastrophic spinal injuries when the driver of the car, in which he was a rear passenger, fell asleep at the wheel. The vehicle veered off the highway and into a ditch.²⁹⁷ The site where the vehicle left the highway was within a substantial resurfacing and safety-improving project, which was completed years earlier, pursuant to an agreement between the Thruway Authority and Callanan Industries, as the general contractor.²⁹⁸

The project plans and specifications called for the removal and replacement of existing guiderail with a longer guiderail system.²⁹⁹ In a related agreement, the Thruway Authority engaged a construction-engineering firm (engineer) to inspect and supervise the contractor's compliance with the plans and specifications.³⁰⁰ "Under the . . . agreement with [the contractor], the engineer's recommendation was required before final acceptance of the contractor's work."³⁰¹

The contractor entered into a subcontract for the installation of the guiderail system, which incorporated the general contract by reference.³⁰² Pursuant to the subcontract, "all drawings, certifications and approvals of the Subcontractor shall be submitted for approval of the Architect or Engineer."³⁰³ "In addition, [the contractor] reserved the right to demand at any time that [subcontractor] furnish evidence of its ability to fully perform the subcontract in the manner and within the time specified in the subcontract."³⁰⁴

"The gravamen of the action was both the negligent failure to complete the full [installation] of new guiderailing called for by the general contract and . . . subcontract, and [the engineer's] negligent inspection and approval of the installation, despite such non-completion."³⁰⁵ The contractor and the subcontractor moved for summary judgment, arguing that, "as purely contracting parties with respect to installation of the guiderailing, they owed no duty to the

297. *Church v. Callanan Indus., Inc.*, 782 N.E.2d 50, 51 (N.Y. 2002).

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.* (internal quotations omitted).

304. *Id.*

305. *Id.*

plaintiffs.”³⁰⁶ The plaintiff’s submitted opinion evidenced that, had the guiderailing been completed in accordance with the contracts, the car would have been prevented from traveling down the embankment.³⁰⁷

The subcontractor “had no preexisting duty imposed by law to install guiderailing at that point on the Thruway.”³⁰⁸ “There was no evidence in the record that the incomplete performance of [the] contractual duty to install [] guiderailing . . . created or increased the risk of [the car’s] divergence from the roadway beyond the risk which existed, even before . . . any contractual undertaking.”³⁰⁹ The plaintiff did not contend that the loss of control of the car occurred because the driver detrimentally relied on the continued performance of the contractual duties when she failed to remain awake and alert at the wheel.³¹⁰ Finally, “tort liability for breach of contract will not be imposed merely because there is some safety-related aspect to the unfulfilled contractual obligation.”³¹¹ If liability invariably follows non-performance of some safety-related aspect of a contract, the exception would assume the general rule against recovery in tort, based merely upon the failure to act as promised.³¹² There are limitations on the imposition of liability based upon a defendant’s assumption of its promisee’s duty to safeguard third persons.³¹³

The court in *Church* found that the subcontractor:

did not comprehensively contract to assume all the Thruway Authority’s safety-related obligations with respect to the guiderail system. Instead, the Thruway Authority retained a separate project engineer to provide inspection and supervision of all aspects of the project, including contract compliance with respect to the stipulated length of the guiderail system.³¹⁴

Conversely, the contractor “assumed significant obligations to assure that the construction complied with the project specifications and . . . in a timely fashion, thus undertaking an obligation to inspect and oversee all aspects of the subcontractor’s work.”³¹⁵

306. *Id.* at 52.

307. *Id.*

308. *Id.*

309. *Id.* at 53.

310. *Id.*

311. *Id.* at 54.

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.*

The subcontractor “had no reason to foresee the likelihood of physical harm to third persons as a result of reasonable reliance by the Thruway Authority on it to discover” any alleged safety defects, and therefore did not assume the corresponding potential tort liability.³¹⁶

CONCLUSION

A substantial portion of significant decisions by the Court of Appeals during the past year may have a profound impact on civil litigation, specifically with regard to municipal liability. Given the complexity and potential impact of several of the key rulings, the court may be required to provide further guidance and interpretation in the same areas in the coming years.

316. *Id.* at 55.

EMOTIONAL HARM IN HOUSING DISCRIMINATION CASES: A NEW LOOK AT A LINGERING PROBLEM

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INTRODUCTION

With the United States Supreme Court's condemnation of legal segregation in *Brown v. Board of Education*¹ in 1954, and a vigorous civil rights movement that led to the passage of the 1964 Civil Rights Act,² the nation entered the beginning of a new era in race relations. This, and future civil rights legislation, would be characterized by the development of a national agenda for ending discrimination and promoting equality.³ One area that was not included in this initial congressional effort, but later found its way into the legislative agenda, was the subject of housing discrimination. Despite the relatively few debates and the near absence of any extensive record from committees, Congress finally passed the Civil Rights Act of 1968.⁴ This provision, enacted as 42 U.S.C. §§ 3601-3619 and § 3631, and also known as the Fair Housing Act

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1. 347 U.S. 483 (1954).

2. Pub L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

3. The term "the Second American Revolution" was coined over half a century ago to refer to this period of change. ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877*, at xxiii (1988). The struggle to pass the 1964 Civil Rights Act is certainly a continuation and extension of the civil rights concepts enshrined in the Fourteenth Amendment and the Civil Rights Act of 1868.

4. See Jean E. Dubofsky, *Fair Housing: A Legislative History and a Perspective*, 8 WASHBURN L.J. 149, 160 (1969) (noting that the combination of the assassination of Martin Luther King and the release of the Kerner Commission Report following massive rioting in 1968, prompted Congress to pass a version of the Fair Housing Act that

("FHA"), prohibits discrimination in the lease, sale, or rental of housing on the basis of race, color, religion, sex, familial status, or national origin.⁵ Nevertheless, many recent commentators have agreed that few areas of the law have failed to achieve their lofty goals as dramatically and persistently as our nation's fair housing statutes.⁶ The dream of ending discrimination in housing, which many hoped would provide the vehicle for integrating neighborhoods, schools, and eventually the nation's consciousness, has been largely unrealized.⁷ Some have argued that this has been primarily due to the deficiencies in the law itself.⁸ Others criticize the limited enforcement it has received,⁹ but most agree that persistent opposition to the integration of our housing market has left Title VIII as an ironic component of the civil rights arsenal.¹⁰ The law certainly stands as a bold and optimistic proclamation. As stated by Senator Walter Mondale, one of its sponsors, the Act would replace the nation's ghettos by "truly integrated and balanced living patterns."¹¹ While some civil right measures have been curtailed over the years, Title VIII has been uniformly supported by the few Supreme Court decisions that have reviewed the constitutionality or

was almost identical to the bill introduced by Senator Mondale that had been previously rejected).

5. 42 U.S.C. §§ 3604-3619 (2003); *id.* § 3631.

6. See Margalynne Armstrong, *Desegregation Through Private Litigation: Using Equitable Remedies to Achieve the Purposes of the Fair Housing Act*, 64 TEMP. L. REV. 909, 913-15 (1991) (commenting on Congress's continued legislative efforts to combat housing discrimination and the remaining deficiencies in the current state of the law).

7. See DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 2-3 (1993) (stating that continued segregation in urban America has been largely overlooked for the past twenty years).

8. Armstrong, *supra* note 6, at 910-12 (arguing that although the 1988 amendments did remove the limitations on damages and added the option of seeking an administrative remedy, systemic housing segregation could only seriously be addressed by an equally large scale enforcement effort on the part of the government).

9. Guido Calabresi, *Preface to THE FAIR HOUSING ACT AFTER TWENTY YEARS: A CONFERENCE AT YALE LAW SCHOOL* 7, 7-8 (Robert G. Schwemm ed., 1989).

10. The 2002 Fannie Mae National Housing Survey found that only thirteen percent of whites and twenty percent of African-Americans cite a neighborhood's ethnic makeup as key to their choice of where to purchase a home. *THE GROWING DEMAND FOR HOUSING: 2002 FANNIE MAE NATIONAL HOUSING SURVEY 5* (2002), *available at* <http://www.fanniemae.com/global/pdf/media/survey2002.pdf> (last visited Mar. 15, 2003). Nearly half (forty-seven percent) of the African-American respondents, however, said that they are treated less fairly than other groups in the home-buying process. *Id.* at 11. These statistics illustrate the disparity between a growing acceptance of multiracial communities on the one hand, and African-Americans' experiences of housing discrimination on the other.

11. *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972).

the application of the statute.¹² Since its adoption over thirty years ago, lower courts have mainly adopted an interpretation of the Fair Housing Act that reflects an effort to fulfill its broad legislative purpose.¹³ Many state agencies have also adopted the principle prohibitions of Title VIII,¹⁴ and with its 1988 amendments, the law has been strengthened, broadened, and attorney's fee provisions have permitted the private bar to play a primary role in its enforcement.¹⁵ Nevertheless, housing discrimination remains persistent and Title VIII is a mere stopgap measure for a social issue that seems intractable.¹⁶

Despite repeated judicial sanctioning of the most egregious forms of housing discrimination, there are areas of fair housing law and litigation that warrant a closer examination because they reveal the legacy of racial discrimination that continues to infect the process of change in this field. This Article will examine one aspect of compensation remedies in fair housing cases. While the general scope of potential damages under Title VIII has been well established for many years,¹⁷ one area of potential relief that remains fraught with uncertainty is adequate compensation for emotional

12. While the Supreme Court has never ruled on the constitutionality of Title VIII, several lower courts have addressed the issue. *United States v. Parma*, 661 F.2d 562, 571-73 (6th Cir. 1981); *United States v. Bob Lawrence Realty, Inc.*, 474 F.2d 115, 120 (5th Cir. 1973), *cert. denied*, 414 U.S. 826 (1973). "All of these court decisions have been rendered by lower federal courts. . . . The Supreme Court, in almost 20 years since Title VIII was enacted, has not decided a single substantive case under the Fair Housing Act." BUREAU NAT'L AFFAIRS, *THE NEW FAIR HOUSING LAW: IMPACT AND ANALYSIS* 20 (1988).

13. One of the early cases that addressed the breadth and scope of Title VIII was *Trafficante*. In that case, the Court said that Congress intended the FHA to be construed broadly to carry out its mandate to achieve fair housing opportunities, and that the interpretations by the United States Department of Housing and Urban Development ("HUD") be given considerable weight. *Trafficante*, 409 U.S. at 211.

14. For a full list of state laws prohibiting housing discrimination, see 1A ASPEN LAW & BUS., *FAIR HOUSING- FAIR LENDER* (2001).

15. *Trafficante*, 409 U.S. at 211 (describing private lawyers as "private attorneys general," for the purposes of enforcement); see Keith Aoki, *Recent Developments, Fair Housing Amendments Act of 1988*, 24 HARV. C.R.-C.L. L. REV. 249, 262 (1989) (listing the extension of coverage to the handicapped and families, strengthening the administrative review process, increasing penalties, and permitting attorney fees for successful plaintiffs).

16. MASSEY & DENTON, *supra* note 7, at 187.

17. An early case is *Steele v. Title Realty Co.*, in which a prospective tenant sued a real estate broker under the FHA. 478 F.2d 380, 382 (10th Cir. 1973). The Tenth Circuit stated that, "[d]amages in cases of this kind are not limited to out-of-pocket losses but may include an award for emotional distress and humiliation." *Id.* at 384. Later, after the 1988 amendments to Title VIII, a California district court held that "[t]he FHA. . . entitles the original plaintiff in a private action for violation of the provisions of the Act to seek an award of 'actual and punitive damages.' This includes

distress.¹⁸ While the general trend of cases, in both administrative agencies and courts, indicates that significant progress has been made in the recognition and understanding of emotional harm, failures to adequately address this issue continue.¹⁹ Although administrative judges appear more receptive to evidence of emotional harm and are more likely to award significant damages now than in the past,²⁰ the federal bench has not demonstrated a similar consis-

damages for emotional distress, humiliation, and mental anguish." *Ambruster v. Monument 3: Realty Fund VIII Ltd.*, 963 F. Supp. 862, 865 (N.D. Cal. 1997).

18. See ROBERT G. SCHWEMM, *HOUSING DISCRIMINATION: LAW AND LITIGATION* 25-17 to 25-21 (2002).

Establishing the size of a Title VIII damage award has turned out to be a most uncertain process. Awards of actual damages in private fair housing cases have ranged from as little as \$1 to as high of \$1 million and more. The case law provides little in the way of explanation for these variations or of guidance or standards for evaluating future fair housing claims.

Id. at 25-17 to 25-20.

19. See Robert G. Schwemm, *The Future of Fair Housing Litigation*, 26 J. MARSHALL L. REV. 745, 758-60 (1993). Professor Schwemm notes that:

[t]he upper level of damage awards in fair housing cases has increased dramatically in recent years. Four cases in a thirteen-month period from 1991 to 1993 illustrate this phenomenon. First, in December 1991, a Los Angeles case involving rental discrimination against blacks and Hispanics was settled for \$1,100,000, the first time a Title VIII case had exceeded the one million dollar figure. In May of 1992, a jury in Washington, D.C., awarded \$850,000 to a black homeseeker and two fair housing groups against a condominium complex that had used only white models in its advertisements. A few months later, another Washington jury awarded \$2,000,000 in punitive damages and \$415,000 in compensatory damages to an individual and two fair housing groups in a rental case involving familial status discrimination. . . . The results in these cases reflect a general trend toward much higher awards that make the size of earlier fair housing verdicts seem paltry by comparison.

Id. at 759. *But see* *Portee v. Hastava*, 853 F. Supp. 597, 607-09 (1994) (reversing a jury's damages award, saying that it was shocking to the judicial conscience, despite testimony concerning the impact of the discrimination on an interracial couple's relationship, the wife's performance on her job, the husband's attempt to lessen the trauma through drinking, and the impact on a minor child who was subjected to one of his first experiences with racism. Also, in *Johnson v. Hale*, the district court refused to order any compensation for emotional harm. 13 F.3d 1351, 1352 (9th Cir. 1994). On remand, the judge ordered \$125 for each victim. *Id.* at 1353. In *United States v. Lepore*, a victim was only awarded \$500 for emotional distress. 816 F. Supp. 1011, 1025 (M.D. Pa. 1991). These amounts represent a near total disbelief that discrimination produced emotional harm and it is precisely this uneven, potentially biased, and idiosyncratic approach that is addressed in this Article.

20. Schwemm, *supra* note 19, at 757 n.89 ("All of the large HUD ALJ awards for intangible injuries" have been made in race cases). This may reflect the fact that unlike state or federal court judges, the HUD administrative judges are specialists in discrimination matters and may have become more sensitive to these issues as a result.

tency toward accepting claims of emotional harm.²¹ Despite the progress in judicial recognition of the emotional harm caused by racism, there is still a disturbing trend that diminishes the value ascribed to the harm suffered by victims of housing discrimination and limits proper compensation.²²

There are many variables that affect the awarding of emotional harm damages.²³ Achieving full compensation for emotional harm resulting from discrimination presents special practical problems and raises theoretical issues that deserve greater attention. This is particularly true in light of the new perspectives on racial discrimination emanating from the critical race and feminist legal movements.²⁴ Insights from these theoretical perspectives and social science studies suggest that when confronted with the full panoply of remedies designed to fully compensate the victim of housing discrimination, some juries and judges are unable to comprehend the depth of harm from discrimination and do not see an African-American plaintiff through an empathetic, unbiased lens.²⁵ Compensating a victim of racial discrimination requires a level of empa-

21. Deborah Dubroff, *Sexual Harassment, Fair Housing and Remedies: Expanding Statutory Remedies Into a Common Law Framework*, 19 T. JEFFERSON L. REV. 215, 228 (1997).

22. The current focus on the emotional harm component of a housing discrimination case owes much to the early work of Professor Robert G. Schwemm. In 1981, Professor Schwemm pointed out that courts and administrative agencies were reluctant to recognize the depth of emotional harm caused by discrimination. Robert G. Schwemm, *Compensatory Damages in Federal Fair Housing Cases*, 16 HARV. C.R.-C.L. L. REV. 83, 104 (1981). He argues that the legal theories that underlie compensation for emotional harm were common in housing discrimination cases, but pointed out several reasons for the very low awards that he tracked in both administrative agencies and courts. *Id.* at 93-94. These include the lack of any definitive guidelines, the presumption that the victim will react to discrimination like a "reasonable person" (the traditional tort standard), the possibility of jury bias, and the receptivity of the judge. *Id.* at 101, 108-09, 115.

23. *Id.* at 86.

24. See, e.g., Angela P. Harris, *Foreword to The Jurisprudence Of Reconstruction*, 82 CAL. L. REV. 741, 743 (1994) (describing the Critical Race movement, she states, "CRT inherits from traditional civil rights scholarship a commitment to a vision of liberation from racism through right reason. Despite the difficulty of separating legal reasoning and institutions from their racist roots, CRT's ultimate vision is redemptive, not deconstructive."). The Authors attempt to apply "right reason" in Part III of this Article where recommendations are made for addressing the issue of emotional harm in housing discrimination cases.

25. See 1 HUGH F. BUTTS, *THE BLACKNESS OF DARKNESS* 99 (1993).

A frequently expressed sentiment is the view that white Americans lack empathy for Blacks and as a result can not [sic] identify with racism and oppression, and take steps to extirpate them. Without accepting or rejecting that view, one wonders at the difficulty in developing empathy toward any group that is regarded as lowly or inhuman. Thus, the development of empathy

thy and understanding that consists of more than a careful weighing of the evidence.²⁶ While this Article does not assert that bias by the fact-finder is the single cause of low damage awards, there is concern about the unevenness and general devaluation of many emotional harm awards, their causes, and consequences.²⁷ Emotional harm claims in housing discrimination cases tend to subtly reflect the shadow of racism in this country.²⁸ It is the persistence of segregated housing patterns that contributes to a lack of understanding of the impact of racism and a diminished sense of empathy that is so essential in compensating the full nature of the dignitary harm that flows from housing discrimination.²⁹

While the pioneering work in critical race theory is one of the lenses through which the present theories of compensation are examined, particularly as it applies to African-American victims of housing discrimination, this Article also draws on other resources. The Authors have utilized the insights of personal experience in the fair housing clinic as a means of developing a practical strategy to address this problem.³⁰ This approach has led to a review of relevant social science data that offers some explanations and perspectives on the effects of discrimination on its victims.³¹ More importantly, this Article attempts to address the issue with

appears to be secondary to an understanding of the barriers, resistances, myths, and unconscious conflicts that inhibit that development.

Id. Dr. Butts has testified as an expert witness in a number of Title VII and fair housing cases and has lectured on this subject at the Columbia Law School Fair Housing Clinic.

26. See *Curtis v. Loether*, 415 U.S. 189, 198 (1974) (recognizing that jury bias may deprive a victim of discrimination the full consideration she deserves).

27. Schwemm, *supra* note 22, at 121-22.

28. MASSEY & DENTON, *supra* note 7, at 97.

29. See, e.g., Diane Maluso, *Shaking Hands With a Clenched Fist: The Effects of Interpersonal Racism*, in *THE PSYCHOLOGY OF INTERPERSONAL DISCRIMINATION* 50 (Bernice Lott & Diane Maluso eds., 1995). Maluso outlines findings from sociological studies that have shown that reducing biases and stereotypes occurs most effectively in social interactions where there is interracial contact between persons of equal status, "in the pursuit of common goals." *Id.* at 58. This contact must be sustained and is enhanced by strong institutional support or authority figures. *Id.* at 74. In other words, the interpersonal activity that would normally occur in an integrated community can be a major factor in achieving the conditions for a lessening of bias. But conversely, the absence of integrated social experiences makes it more difficult to overcome social biases.

30. Conrad Johnson has been teaching a fair housing clinic at Columbia Law School for the past eleven years. Victor Goode worked with him and Professor Mary Zulack as a visiting clinical professor from 1994 through 1996 and served on the Board of the Open Housing Center. Their many discussions on this issue motivated the development of this Article.

31. See *infra* Part II.

recommendations for presenting emotional harm issues so that both plaintiffs' attorneys and members of the judiciary can develop a deeper and more comprehensive understanding of the effects of emotional harm on victims of discrimination.³² In examining these issues, there will be a review of the use of medical and psychotherapeutic treatment and the use of expert witnesses. It will also suggest an approach for educating fact finders about the nature of the emotional harm that flows from a racist event.

There are no empirical studies that adequately explain how and why decision-makers value emotional harm in housing discrimination cases in a manner that differs so greatly from the victim's experience and the scientific evidence of the effects of trauma resulting from discrimination.³³ This Article argues that biased perceptions, a lack of information about the depth of emotional trauma, or racial insensitivity may affect this process and it will change only with a renewed effort and a different approach to these cases from the civil rights bar.³⁴ It is also an attempt to provide information that may assist in the proper evaluation of emotional injury with data from social science sources that have not

32. Professor Schwemm's pioneering work in this field has laid the foundation for future inquiries, including this Article. He points out that amassing the evidence of emotional harm may be difficult. SCHWEMM, *supra* note 18, at 25-31 to 25-33. We also believe that attorneys who take on housing discrimination cases do so out of a personal and professional commitment to end this extremely destructive aspect of discrimination in our society. This Article attempts to expand on this base by taking a look at data drawn from inter-disciplinary sources, particularly the fields of psychology, psychiatry, and sociology. While many of the problems in the development of the emotional harm aspects of a discrimination case remain as Professor Schwemm described them in 1982, studies in the social sciences have added considerable depth and theoretical insight to those issues. Armed with this additional information, practitioners may be even better prepared to plan the strategy of their case. For a fuller discussion of these practical issues, see *infra* Part III.

33. In stark contrast to the almost cavalier perspective offered by some judges, see Hope Landrine & Elizabeth A. Klonoff, *The Schedule of Racist Events: A Measure of Racial Discrimination and a Study of Its Negative Physical and Mental Health Consequences*, 22 J. BLACK PSYCHOL. 144, 145-47 (1996).

[R]acist events (unlike losing one's car keys or getting stuck in a traffic jam) are inherently demeaning, degrading, and highly personal; they are attacks upon and negative responses to something essential about the self that cannot be changed: being an African American. Racist discrimination thereby has a higher potential to erode the physical and mental health of African Americans.

Id. at 147. "[T]he single most common problem presented by African Americans who seek psychotherapy is anger about racism in their lives." *Id.* at 160.

34. Schwemm, *supra* note 22, at 107 n.124 (referring to the Court's opinion in *Curtis v. Loether*, 415 U.S. 189 (1974), when acknowledging that low awards for emotional harm may be due to jury prejudice).

previously been marshaled primarily for this purpose.³⁵ Evidence of emotional harm must be presented in a manner that reveals the full scope of its effects. The under-valuation by decision-makers is not for the most part an open hostility to the reality of racial harm as much as it is a lack of understanding and a reflection of the cognitive distortion of race and racial issues that is a social phenomena as well as a legal one.³⁶ This Article will explore these dynamics from the perspective of relevant social science data and examine how they affect the analysis and understanding of evidence of emotional harm.³⁷ Part I provides an overview of the current state of emotional harm cases. Part II discusses the issue of bias in the process of reviewing discrimination cases from the perspective of critical race theory and recent social science data. In Part III, this Article examines the cycles of ignorance that have contributed to an under-valuation of emotional harm in housing discrimination litigation. Finally, suggestions are made about how to gather relevant psychological and medical information on the effects of discrimination and how to incorporate that information into a case so that the full extent of emotional harm is more properly understood and the victim of discrimination is made whole.

I. EMOTIONAL HARM OVERVIEW

Title VIII of the 1968 Civil Rights Act has been the primary legal instrument at the federal level for attacking housing discrimination for the last thirty years.³⁸ The Act has had mixed results, but has

35. While the use of expert witnesses, particularly psychologists or therapists, has been previously recommended, this Article attempts to expand upon those more general recommendations. In particular, the issues of exploring bias from fact-finders are examined, contextualized, and an individualized picture of the harm suffered by people of color is presented. For a very valuable early treatment on emotional harm issues, see Larry Heinrich, *The Mental Anguish and Humiliation Suffered by Victims of Housing Discrimination*, 26 J. MARSHALL L. REV. 39, 39 (1992).

36. See generally GORDON ALLPORT, *THE NATURE OF PREJUDICE* (1st ed. 1954). This is one of the definitive works on racism and bias. He queries whether "discrimination and prejudice [are] facts of the social structure or of the personality structure." *Id.* at 514. The answer, according to this Article, is both. Allport describes racism as a social problem that has historical roots. *Id.* at 208-11. He describes how prejudice is learned behavior by all groups and its belief structure is acquired from the social order as the individual personality develops. *Id.* at 17-19, 297-310.

37. The premise of this Article is not that every judge and jury is biased against minority plaintiffs. It is more likely that judges and juries in many cases may be no better prepared than the general population in understanding the effects of discrimination and in their ability to give full value to those effects when the evidence is presented.

38. See ROBERT G. SCHWEMM, *HOUSING DISCRIMINATION LAW* 15 (1983). In 1968, the Supreme Court, in *Jones v. Alfred H. Mayer Co.*, gave new life to the Recon-

generally received judicial support, and over its brief life there has been very little dilution in its scope and application.³⁹ Unlike the Equal Protection Clause of the Fourteenth Amendment and Title VII of the 1964 Civil Rights Act, which have gone through an evolution of expansion followed by a more restrictive interpretation by the Courts,⁴⁰ the FHA and its post-Reconstruction predecessor, 42 U.S.C. § 1982, have both received supportive judicial interpretations and have changed very little.⁴¹ Yet, despite this generally favorable judicial treatment, housing discrimination remains a persistent social problem, which seems to elude any solution through litigation.⁴² Persistent patterns of residential segregation are a constant reminder of the lack of progress that this country has made toward the integration of living space.⁴³ This Ar-

struction era statute, 42 U.S.C. § 1982, which guarantees all persons the right to sell, lease, and convey property. 392 U.S. 409, 413 (1968). The Court held that § 1982 of the Civil Rights Act of 1866 barred racial discrimination in the sale, rental, and lease of housing. *Id.* at 413. While the language of the FHA and § 1982 differ, both have as their underlying principal Congress's authority to bar discrimination in housing. *Id.*

39. The courts have generally supported the scope of coverage of the FHA, although some procedural aspects of the FHA have been limited by the Supreme Court. *See, e.g.,* Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 98 (1979) (dealing with standing); *Curtis*, 415 U.S. at 195 (dealing with the right to a trial by jury); *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 205 (1972) (dealing with standing). In *Trafficante*, the Court reiterated its decision to follow Congress's intent to construe the act broadly. 409 U.S. at 209-10.

40. An example of this trend is the requirement for a finding of discriminatory intent articulated by the Court in *Washington v. Davis*. 426 U.S. 229, 238-39 (1976). This interpretation is generally seen as a limiting factor on the use of the Equal Protection Clause in proscribing racial discrimination. *See* Derrick A. Bell, *Foreword: Equal Employment Law and the Continuing Need for Self-Help*, 8 LOY. U. CHI. L.J. 681, 683 (1997). Similarly, the school desegregation cases saw the Fourteenth Amendment scaled back as a tool for creating integrated public schools. In *Milliken v. Bradley*, inter-district desegregation remedies were restricted. 418 U.S. 717, 741 (1974). The decision in *Freeman v. Pitts* raised the de facto-de jure distinction to a doctrinal level that all but trumped the principle of integration as a continuing legacy of *Brown*. 503 U.S. 467, 469 (1992). Ironically, one of the reasons for the "re-segregation" of the schools in Dekalb County Georgia, described in *Pitts*, was "white flight" from the district. *Id.* at 506. This gradual change in housing patterns along racial lines altered the Court's ability to make student assignments in a manner that could remedy the effects of the previously segregated schools.

41. *See* SCHWEMM, *supra* note 38, at 227-98 (discussing the procedures for enforcement and cases supporting Title VIII).

42. MASSEY & DENTON, *supra* note 7, at 60-82.

43. *Id.* This point has been brought out in dramatic fashion by Massey and Denton. They cite considerable evidence that housing discrimination remains one of the most persistent and damaging legacies of America's history of racial subordination. *Id.* Their data shows that despite our efforts to enforce fair housing laws at the state and federal level, society has made very little progress toward the desegregation of our living space. *Id.* at 64. They also say that the main factor is the continued sense in a considerable portion of white society that while civil rights may be desirable in

ticle argues that one corollary to the persistence of housing discrimination is the devaluation of the experience of its victims. While there is little evidence that this phenomenon is motivated by ill will or open hostility by fact-finders, their reluctance to comprehend and value the full extent of the psychological damage of racism and the true toll that it imposes on its victims continues to be reflected in low awards for many FHA claimants.⁴⁴ Racial bias does not suffice as the sole explanation for low and frequently uneven compensatory damages in all cases. For the most part, fact finders and jurors, the majority of whom are white, view racial issues no differently than the general population.⁴⁵ But there are misperceptions about race that remain prominent in American culture, which can affect numerous areas of decision-making, including the courts, unless a conscious and consistent effort is made to identify and remove them.⁴⁶

Since 1974, with the decision of the Supreme Court in *Curtis v. Loether*,⁴⁷ courts have had broad equitable powers as they apply the FHA to violations and lower courts have been awarding damages for the emotional harm suffered by victims of racial discrimination.⁴⁸ The typical framework for relief in these cases is for the plaintiff to seek an injunctive remedy, compensatory damages, pu-

theory, the "not in my backyard" phenomenon is especially strong when it comes to sharing neighborhood living space and the subsequent potential for social interaction. *Id.* at 79-82. Finally, their findings show that while this phenomenon affects white acceptance of Asians and Latinos to varying degrees, its most persistent and stubborn resistance is applied to the African-American. *Id.* at 67, 77. See Kathleen C. Engel, *Moving Up the Residential Hierarchy: A New Remedy for an Old Injury Arising From Housing Discrimination*, 77 WASH. U. L.Q. 1153, 1154-55 (1999).

A 1979 study funded by the Department of Housing and Urban Development ("HUD") estimated that there were two million incidents of housing discrimination on the basis of race each year. More recent evidence reveals that high rates of discrimination continue. In 1989, a HUD-sponsored fair housing study of the number of listings shown to prospective buyers and renters found that in over forty percent of the audits, blacks were shown fewer listings than whites. Similarly, agents showed Hispanic renters fewer units than whites in thirty-five percent of the audits, and showed Hispanic buyers fewer units in over forty percent of the audits. Other audits have uncovered even higher rates of housing discrimination, including one study that found a ninety-percent discrimination rate.

Id. at 1155.

44. See *supra* notes 19-22.

45. See *infra* Part II.

46. See Maluso, *supra* note 29, at 72-75 (noting various misperceptions about race in society and some methods of changing those perceptions).

47. 415 U.S. 189 (1974).

48. SCHWEMM, *supra* note 38, at 254.

nitive damages, or some combination of all three.⁴⁹ The principle that underlies this remedy is that an aggrieved party should be “made whole,” through the remedial process.⁵⁰ The courts have generally adopted this “make whole” theory in housing discrimination cases.⁵¹

In *Curtis*, the Supreme Court stated that emotional harm in a housing discrimination case was similar to defamation or intentional infliction of emotional distress in tort law.⁵² Emotional harm can be recognized in any claim for damages as long as sufficient evidence establishing a causal link to the discriminatory act is proven.⁵³ The importance of this holding cannot be understated because Title VIII, § 3613(c)(1), had no specific language to guide courts on awarding damages.⁵⁴ The *Curtis* Court was unperturbed by this omission and found an adequate rationale in tort remedies bolstered by the general equitable powers vested in the federal courts to hold that the legislation authorized equitable relief, including damages similar to the tort of intentional infliction of emotional distress.⁵⁵ While some states had previously enacted anti-discrimination laws authorizing courts and administrative agencies to offer similar relief,⁵⁶ *Curtis* firmly established this principle in

49. *Id.* See, e.g., *Seaton v. Sky Realty Co.*, 491 F.2d 634, 635 (7th Cir. 1974). While the Civil Rights Act of 1866, ch. 31, 14 Stat. 27, 42 U.S.C. 1982 to 1988 (codified as amended in scattered sections of 42 U.S.C.), does not contain specific language authorizing the award of damages or equitable relief, the modern interpretation of the statute has held that the full range of equitable remedies is available to a federal court in fashioning a remedy for any violation of the statute. See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 409 (1968). While Title VIII, only specifically authorizes the award of actual damages, it has been interpreted to provide for damages for emotional harm. *Slatin v. Stanford Research Inst.*, 590 F.2d 1292, 1294 (4th Cir. 1979).

50. Schwemm, *supra* note 22, at 91. The concept of remedies in discrimination cases broadly encompasses the right of a successful plaintiff to have access to the variety of equitable relief that will provide real compensation for the injury that the plaintiff suffered, including emotional harm. DAN B. DOBBS, *THE LAW OF TORTS* 829 (2000). While the typical case does not usually involve considerable direct costs, the emotional harm compensation as well as potential punitive damages can add to the overall costs. *Id.* at 1053-54.

51. *Slatin*, 590 F.2d at 1294.

52. 415 U.S. at 195.

53. *Id.* at 196.

54. *Id.* at 197.

55. *Id.* at 196.

56. For a summary of state and federal cases and other resources dealing with the emotional harm component of housing discrimination, see 1 KENTUCKY COMM'N ON HUMAN RIGHTS, STAFF REPORT 82-1, DAMAGES FOR EMBARRASSMENT AND HUMILIATION IN DISCRIMINATION CASES—THE RIGHT TO COMPENSATION FOR PSYCHIC INJURY RESULTING FROM HOUSING DISCRIMINATION 69-79 (1982).

the federal enforcement arsenal of the FHA.⁵⁷ While none of these early cases relied specifically on the dicta from *Brown*, the acceptance by later federal courts that emotional harm flowed from discrimination was certainly strengthened by the Supreme Court's acknowledgment of dignitary harm for a victim of racial discrimination.⁵⁸ This theory of discrimination and emotional harm alluded to in *Brown*,⁵⁹ also echoed studies of the harm caused

57. *Curtis*, 415 U.S. at 198 (affirming that Title VIII violations could result in damages for emotional harm and that the defendant was entitled to a jury trial).

58. It is worth noting that Justice Marshall, one of the architects of the *Brown* litigation, wrote the *Curtis* opinion.

59. The trial court in *Briggs v. Elliot*, one of the four cases consolidated into the *Brown* decision heard testimony from Dr. Kenneth Clark, a social psychologist who testified as an expert witness. RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 353 (1976). Dr. Clark used a doll preference study to demonstrate that legally imposed segregation had a detrimental psychological impact on the African-American students in the segregated Claridon County schools. *Id.* at 353-54.

One of the controversial points of Dr. Clark's study was its focus on the self-deprecation or self-hatred aspects that were triggered by racial discrimination. *Id.* at 353. The premise of his theory was that the victim internalizes the accusations and characterizations of inferiority from the perpetrator or dominant class and begins to accept them as true. *Id.* In the doll study, this phenomenon manifested as a preference by the young black girls for white dolls and an explicit rejection of racial characteristics associated with their own race depicted in the brown doll. *Id.* at 330-31, 354. This overt rejection of aspects of one's self was presented to the Court as evidence of emotional damage that resulted from imposed segregation. *Id.* at 353-54.

There were, however, problems with the Clark study from both a legal and scientific perspective. Dr. Clark conceded at the time of the trial that it wasn't possible to isolate the effects of school segregation from other influences of racial injustice and thereby satisfy the standard of direct legal causation. *Id.* at 379. Later social scientists have refuted the validity of Dr. Clark's study because of the small size of his sampling and the somewhat ambiguous terminology that Clark used in questioning the children about their identification with either the black or white doll. See Ernest Van Den Haag, *Social Science Testimony in the Desegregation Cases—A Reply to Professor Kenneth Clark*, 6 VILL. L. REV. 69, 74-76 (1960). But despite these weaknesses, Dr. Clark had fashioned his study and findings on evidence from other more comprehensive surveys and relied on the general belief among social scientists at that time that segregation caused emotional harm to its victims. KLUGER, *supra*, at 318-19. Other studies have verified his basic contention that, in addition to whatever material deprivation might characterize the conditions of the segregated school, legally imposed segregation did cause psychological damage. *Id.* at 319.

While the doll study was legally problematic for establishing a clear chain of causality, pioneering work by the famed psychiatrist Dr. Frantz Fanon was also exploring similar issues of emotional damage flowing from the skewed social relationship of one race holding social, political, and economic dominance over another in his path breaking work *Black Skin, White Mask*. FRANTZ FANON, *BLACK SKIN, WHITE MASK* 141 (1967). In her analysis of the complete body of Fanon's work, Irene L. Gendzier, states that:

Fanon discovered that the alienated Martiniquean existed only where there was a dominant society that had reduced him to an inferior status. What

by discrimination that were being conducted during that same period in the social science community.⁶⁰ These studies explored the idea that racial discrimination was a particularly pernicious form of personal degradation, and one whose psychological impact is often subtle and only fully exposed with the assistance of social science experts.⁶¹

Courts have traditionally employed two overlapping approaches to claims of emotional harm in fair housing cases: traditional tort theory⁶² and constitutional torts.⁶³ In traditional tort theory, the infliction of emotional harm was initially disfavored, but was later

concerned Fanon with respect to the Martiniquean, was the gradual process of alienation from his culture and tradition, and the fact that this was accompanied by self-hatred or at the least, a profoundly disturbed ambivalence. The rejection of the self came as a result of identification with the Other and as a result of the acceptance of the Other's image of one's "inferior" caste.

IRENE L. GENDZIER, FRANTZ FANON: A CRITICAL STUDY 50 (1973). While Fanon's work was preoccupied with a social psychoanalytic dimension of colonialism and was, therefore, unencumbered by legal standards of causality, it is clear that the psychological damage that he and Dr. Clark examined stemmed from the same source—racism. *Id.* at 46-47. The attendant social structures needed to enforce these beliefs, such as school segregation in the United States, or colonialism in the case of Martinique and the other non-white French colonies, while considerably different in form, were essentially the same. *Id.* at 6-8. In fact, Fanon's emphasis on the gradual process of this phenomenon might account for the varied results that Dr. Clark received when he performed the doll test in northern integrated schools and southern segregated schools.

In *United States v. Security Management Co.*, an apartment manager was sued under the Fair Housing Act. 96 F.3d 260, 260 (7th Cir. 1996). In the course of determining the liability of the two insurers, the United States Court of Appeals for the Seventh Circuit found that although the complaint did not expressly allege emotional harm, that "racial discrimination, when encountered, is such an affront to one's intelligence and individuality that we may assume, for our purposes, the presence of an allegation of psychological injury." *Id.* at 268. A more recent case cites *Security Management* for the proposition that "one can reasonably assume that a person who is the object of unlawful discrimination will suffer emotional harm." *United States v. Wapinski Real Estate*, 2000 WL 28271, at *9 (N.D. Ill. Jan. 10, 2000).

60. See, e.g., ALLPORT, *supra* note 36. *The Nature of Prejudice*, published in 1954, the year of the *Brown* decision, represented a compilation of studies and theories that Professor Allport began developing during the war years. It is a wide-ranging work that has influenced many future works on the subject. For a retrospective on the importance of *The Nature of Prejudice*, see Roy J. deCarvalho, *Gordon W. Allport on the Nature of Prejudice*, 72 PSYCHOL. REP. 299, 301-05 (1993).

61. See, e.g., Jane Goodman-Delahunty & William E. Foote, *Compensation for Pain, Suffering and Other Psychological Injuries: The Impact of Daubert on Employment Discrimination Claims*, 13 BEHAV. SCI. & L. 183, 187-89 (1995).

62. DOBBS, *supra* note 50, at 821. The most common emotional harm torts are those based on intentional infliction of emotional distress. *Id.* at 822. In the Restatement Second, the three elements of this tort are: 1) severe emotional distress; 2) caused by intentional or reckless conduct; and 3) that is extreme and outrageous. *Id.* at 826. This tort is generally recognized and applies these basic requirements for recovery. *Id.*

recognized as a legitimate claim for which damages might be awarded.⁶⁴ The intentional infliction of emotional distress and negligent infliction of emotional distress are its two variants.⁶⁵ Despite this history with emotional harm issues, courts have generally taken a conservative approach toward the infliction of emotional distress claims, and this general caution carried over into the field of housing discrimination.⁶⁶ There are many understandable reasons for this caution. Some include the general difficulty in placing a monetary value on emotional harm, the difficulty in determining the actual degree of harm, especially when the same degree of offense may affect people very differently, the potential for exaggeration, the lack of objective measures, and low award precedent.⁶⁷ Courts have also commented on the difficulty in making emotional harm fit traditional tort economic theories, and the fear that emotional harm will be a corollary claim to virtually every offense, no matter how trivial.⁶⁸ While these concerns are understandable, courts addressing civil rights claims have never been required to rigidly adhere to a traditional tort framework.⁶⁹ In addition, adhering too closely to this caution can mask any subtle biases that might affect the fact-finding process, and an overly cautious approach would stand in contrast to the recognition in the social sciences that some degree of emotional harm will result from any act of discrimination.⁷⁰ Any difficulties in measuring its magnitude and impact in the legal context are separate and distinct from reservations about its basic validity.

Emotional harm has been generally classified as "humiliation, embarrassment, emotional distress, and other such intangible harms to the plaintiff's personality."⁷¹ The effects of emotional

63. *Id.* at 81. Constitutional torts or civil rights torts concern the intentional deprivation of a right protected by the Constitution, or a federal statute. *Id.* at 81-84. The most common constitutional torts involve Fourth Amendment claims, Eighth Amendment claims, and Fourteenth Amendment claims, including any of the procedural or substantive protections flowing from the Equal Protection Clause. *Id.* at 84.

64. *Id.* at 824-25.

65. *Id.* at 822-23. Negligent infliction of emotional distress has no bearing on housing discrimination claims because once there is a finding of discrimination, the act is considered intentional.

66. Schwemm, *supra* note 22, at 121.

67. *Id.* at 85-86.

68. See DOBBS, *supra* note 50, at 81-82. "Civil rights violations are torts. They have generated an important specialty in which the courts look to common law tort rules as models without necessarily accepting their limitations." *Id.*

69. *Martell v. Boardwalk Enter. Inc.*, 748 F.2d 740, 750 (2d Cir. 1984).

70. See, e.g., *Johnson v. Hale*, 940 F.2d 1192, 1193-94 (9th Cir. 1991).

71. SCHWEMM, *supra* note 18, at 25-21.

harm in housing discrimination cases may also lead to increased anger, frustration, depression, resentment, or shame.⁷² Fear that the discriminatory event will reoccur may lead to withdrawal from contact with others or diminished social involvement with friends or family.⁷³ Physical symptoms may also accompany the psychological trauma.⁷⁴ These may include indigestion, ulcers, nervousness, loss of appetite, loss of sleep, impotence, nausea, and intensified allergic reactions.⁷⁵

While compensation for the loss of rights that are protected by statute or the Constitution is a well accepted legal principle, only nominal damages are generally awarded for lost rights.⁷⁶ As a result, many victims must rely on their emotional harm claim as their primary basis for economic compensation. Two reasons immediately come to mind for taking special care to develop the emotional damages phase of a housing discrimination case. First, in most instances, the economic losses, or the out-of-pocket expenses that result from housing discrimination, are not typically extensive.⁷⁷ By the time the issues are litigated, the plaintiff will likely have found alternative housing.⁷⁸ Secondly, the emotional harm experienced is often one of the primary motives for seeking legal redress, but that motivation might diminish if it is not acknowledged and developed early in a case.⁷⁹

72. See Complaint No. FH5841219900 at D34 to D35, *Mitchell v. DiSilva* (No. 93-130) New York City Commission of Human Rights, Recommended Decision and Order, Dec. 12, 1993. In this case Dr. Hugh Butts, a psychiatrist specializing in the effects of discrimination, testified as an expert witness about the general symptoms of victims of discrimination as including feelings of numbness, withdrawal, difficulty in concentrating and focusing, depression, anxiety, and the diminished quality of care given to children. *Id.* at D-34 to D-39.

73. *Id.* at D-34 to D-35.

74. *Id.* at D-34.

75. Alan W. Heifetz & Thomas C. Heinz, *Separating the Objective, the Subjective: Assessing Compensatory Damages In Fair Housing Cases*, 26 J. MARSHALL L. REV. 3, 20 (1992).

76. SCHWEMM, *supra* note 18, at 25-21 to 25-23.

77. *Id.* at 25-24 ("Most fair housing cases do not involve major economic loss.").

78. See *id.* at 25-23 (noting that many plaintiffs mitigate damages by securing alternative housing). While these issues certainly vary from case to case, in most markets the difference in cost between the housing that was denied and the housing that the victim eventually had to accept will not be great. *Id.* at 25-23 to 25-24. In mortgage discrimination cases this may vary because the difference of even a point amortized over the life of a mortgage can be considerable, but injunctive remedies would typically require the renegotiation of the mortgage before the difference in value had accumulated to a substantial degree. See ROBERT G. SCHWEMM, *HOUSING DISCRIMINATION: LAW AND LITIGATION* 25-14 (1994).

79. See, e.g., Joe R. Feagin, *The Continuing Significance of Race: Anti-Black Discrimination in Public Places*, 56 AM. SOC. REV. 101, 101 (1991) (describing the range

Early decisions have implicitly recognized the link between discrimination and emotional distress by generally allowing some monetary recovery for intangible harm if there is credible evidence to support it.⁸⁰ Usually, these damage claims are established through the testimony of the plaintiff about the emotional impact of the discrimination.⁸¹ Emotional harm may even be inferred from the circumstances of the housing transaction.⁸² Moreover, there is no requirement of corroborating testimony of any kind and no requirement for expert medical evidence to establish a claim.⁸³ While traditional tort theory usually requires a showing of outrageous conduct by the defendant and severe emotional harm for recovery,⁸⁴ this higher standard has not been applied in housing discrimination cases.⁸⁵ This seemingly relaxed standard, however, may create the false impression that emotional harm damages are relatively easy to establish and are uniformly receiving wide acceptance.⁸⁶ While the approach by the courts to find emotional harm by inference is both significant and appropriate, the related inference, that the fact-finder can accurately assess the extent of the trauma from the testimony of the victim alone seems less supported by a careful review of damage awards.

In fact, Professor Schwemm, in his chronicle of housing discrimination cases, has pointed out that severe and particularly outrageous conduct by the defendant, along with the nature of the plaintiff's reaction, continue to be critical factors in receiving favorable recognition of emotional harm.⁸⁷ While this assessment

of responses to racist events by African-Americans that usually begin with an assessment of the situation and include consideration of a range of responses from immediate self help/direct confrontation to challenging the act through a lawsuit).

80. *Id.*; SCHWEMM, *supra* note 18, at 25-31 to 25-33.

81. SCHWEMM, *supra* note 18 at 25-31 to 25-32.

82. *Marable v. Walker*, 704 F.2d 1219, 1220 (11th Cir. 1983) ("damages for emotional distress in cases of this type 'may be inferred from the circumstances as well as proved by the testimony.'").

83. SCHWEMM, *supra* note 18, at 25-32.

84. DOBBS, *supra* note 50, at 81.

85. *See, e.g., Seaton v. Sky Realty Co.*, 491 F.2d 634, 638 (7th Cir. 1974); *Parker v. Shonfeld*, 409 F. Supp. 876, 880 (N.D. Cal. 1976); *see also* Schwemm, *supra* note 22, at 115.

86. *See, e.g.,* SCHWEMM, *supra* note 18, at 25-32 to 25-33. He comments that courts exercise a great deal of discretion in these matters. *Id.* at 25-36; *see* Schwemm, *supra* note 22, at 84-86 (describing the absence of clear standards or a predictable pattern to predict the strength of a claim for emotional harm).

87. SCHWEMM, *supra* note 18, at 25-37. It is important to note, however, that the reliance on the outrageousness of the defendants' conduct by some judges in cases that Professor Schwemm has tracked is more similar to the requirements of intentional infliction of emotional distress from tort theory. Even though the courts have

accurately reflects how courts have been leaning towards traditional tort theory in housing cases, it also points to some of the inherent flaws in this approach. Although racial epithets or threats of violence clearly meet the outrageous conduct requirement under traditional tort theory and have caused some courts to award high damage awards, the typical discrimination case today involves more subtle forms of discrimination.⁸⁸ Even though different forms of discrimination may vary in intensity or in relative degree of personal threat, this fact does not automatically mean that significantly less emotional harm has occurred.⁸⁹

Plaintiffs will react differently to the same adverse stimuli.⁹⁰ The impact of racism must be understood in the context of both the incident and the parties involved. Important contextual issues to examine include whether this is the first time the plaintiff attempted to find new housing, whether the plaintiff is seeking to change their neighborhood circumstances, or if there is a spouse or child depending on the plaintiff to find suitable housing. These are only a few variables that can affect the plaintiff's emotional response to the adverse stimulus of discrimination.

Furthermore, as Professor Schwemm has pointed out, the success or failure of an emotional harm claim often depends on "whether the plaintiff is believable, likeable, or vulnerable to stress, and whether the fact-finder is receptive to this type of

never required this approach, and have regularly applied the more relaxed standard that implicitly rejects it, there remains a tendency for some courts to view the emotional harm suffered by the plaintiff as directly proportional to the defendants' conduct. See, e.g., *id.* While this may apply to some cases, the danger here is that it should not be applied as a general rule. The reasons why this approach inevitably fails to capture the real damages experienced by many victims of discrimination will be discussed more fully in Part II.

88. Teresa Coleman Hunter & Gary L. Fischer, *Fair Housing Testing—Uncovering Discriminatory Practices*, 28 CREIGHTON L. REV. 1127, 1128 (1995) ("While certainly not universally true, the general nature of race-based housing discrimination is covert, although overt discrimination still exists.").

89. See Ezra H. Griffith & Elwin J. Griffith, *Racism, Psychological Injury and Compensatory Damages*, 37 HOSP. & CMTY. PSYCHIATRY 71, 72 (1994). The authors indicate that courts tend to review these cases from the traditional intentional infliction of emotional distress framework. *Id.* This assumes that once the act and the proximate cause is established, the distress will be directly proportionate to the severity of the act. *Id.* While there may be sound public policy reasons for this approach, such as deterrence of egregious acts, it fails as sound medical science because the psyche of each individual is different. *Id.* at 74. Some members of racial minority groups may have steeled themselves against racial slights, whereas others are far more sensitive. *Id.* Overall, the authors argue "greater psychiatric input would result in a better assessment of emotional distress so that plaintiffs can produce their evidence of psychological damage in a more professional framework." *Id.* at 75.

90. *Id.* at 73.

claim.⁹¹ It is unfortunate that this subjectivity of perception inherent to a certain degree in all cases, that opens the "objective" fact-finding process to the distortions of skewed racial perceptions. This possibility is heightened when the fact finder must consider cross-cultural empathy and how racism affects society. This is a task for which judges and juries may not have had any special training, but which is critical to fully evaluate the evidence of discrimination and its effect on an individual plaintiff.

Regardless of the court's willingness to accept only plaintiff's testimony to establish an emotional harm claim, other factors should be considered before relying entirely on the victim to fully articulate the nature of the harm suffered. "Many plaintiffs will lack insight into their [psychological] injuries, particularly when the harm [from emotional stress may] develop slowly over a protracted period [of time]."⁹² Secondly, they may be poorly equipped to compare themselves with other healthy individuals, particularly when discriminatory events are common in the lives of people of color.⁹³ There may also be social disincentives or factors that discourage plaintiffs from acknowledging and exhibiting their private sentiments about their injury.⁹⁴ It is also not uncommon for victims of discrimination to suppress any discussion about their injuries, especially if being open and forthcoming might cause them to reveal issues of sexual or emotional vulnerability.⁹⁵ This is particularly true in an environment where social norms characterize people who display anger or pain as weak or unprofessional.⁹⁶

Each of these factors argues for two careful considerations in presenting this phase of a discrimination case. First, the ability of the fact-finder to fully comprehend the effects of racism should not be assumed. It must be developed as fully as possible within the limitations of the trial.⁹⁷ Considerable social science data points to

91. Schwemm, *supra* note 22, at 116. This judicially preferred approach to plaintiff's testimony can also create a double bind. In order to establish liability and to be seen as believable on factual issues, a client must be seen as objective, reliable, and not susceptible to overstatement or instability. *Id.* But a plaintiff's success in conveying these very attributes can create the impression that they were not devastated by the defendant's conduct. *Id.* at 121.

92. Goodman-Delahunty & Foote, *supra* note 61, at 187.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 187-88. This not only raises issues concerning the willingness of a plaintiff to reveal this aspect of themselves in open court, but also their willingness or ability to be exposed to their lawyer.

97. Compare *Portee v. Hastava*, 853 F. Supp. 597 (E.D.N.Y. 1994), with *Broome v. Biondi*, 17 F. Supp. 2d 211 (S.D.N.Y. 1997). In *Portee*, the district court judge re-

significant cultural and experiential differences in how whites and people of color perceive the same information.⁹⁸ Therefore, it may be necessary to construct a “cultural bridge” as part of the trial strategy before the cross-cultural empathy can be established. Secondly, although the focus of proof must be on the individual plaintiff, and not on the experience of any particular group, the connection of the plaintiff to her group is also critical.⁹⁹

Finally, feminist literature offers useful insights on how harm in a social context gets transformed, distorted, or not recognized at all when translated into a legal context. Several of these feminist theories offer transferable lessons for race discrimination cases. In her essay discussing the experience of women and traditional legal concepts of harm, Professor Suzanne Levitt states that “the compara-

versed the jury verdict of \$100,000 for each of the two adult plaintiffs and \$80,000 for their child, calling it clearly outrageous and shocking to the judicial conscience. *Portee*, 853 F. Supp. at 613-14. On the other hand, in *Biondi*, the judge upheld emotional harm damages totaling \$114,000 dollars for each of the two plaintiffs in a suit against a co-op that had discriminated against a middle class interracial couple who were both professionals. *Biondi*, 17 F. Supp. 2d at 215, 226. While the difference between these two awards may correctly be attributed to the different financial capacities of the defendants, it is also clear that Judge Carter in the *Biondi* case was already very familiar with emotional harm issues from his own practice as a lawyer with the NAACP. The History Makers Biography, Robert Carter, at <http://www.thehistorymakers.com/biography/biography.asp?bioindex=106&category=LawMakers> (last visited Mar. 15, 2003). In *Portee*, the record suggests that the judge approached the case with some degree of skepticism, despite testimony that the discrimination caused the husband to withdraw, start drinking, have problems at work, and begin to doubt his ability to support his family. *Portee*, 853 F. Supp. at 608 n.7. His wife testified that she lost some concentration at work and was depressed. *Id.* at 607-08. The court seemed particularly critical that neither party sought medical assistance, despite testimony on how the loss of their preferred rental plunged their lives into turmoil. *Id.* at 608. He also cited a string of low emotional harm awards and reduced the jury's verdict. *Id.* at 616. While cases with such different facts cannot form a symmetrical comparison, a few important issues do seem relevant. The *Biondi* plaintiff's testimony did not characterize their trauma as significantly greater than the Portees to warrant twice the damages. See *Biondi*, 17 F. Supp. 2d at 223. Both cases involved discrimination of a subtle type, and neither involved confrontations or public humiliation. It is possible that a significant factor in the difference of the awards was the level of knowledge about emotional trauma and discrimination possessed by the judge.

98. See *infra* Part II.

99. See, e.g., Landrine & Klonoff, *supra* note 33, at 147. The authors argue that “Afrocentric consciousness,” or a strong sense of group identity:

may be a personality factor (like hardiness for generic life events) which moderates the negative impact of racist events. By providing a cognitive framework for understanding and responding to racist events, an Afro-centric consciousness should decrease the perception of racist events as one's own fault, increase adaptive coping, increase social support seeking, and thereby decrease the negative health and psychological impact of these events.

Id.

tive model (of harm) begins with the assumption that what 'is,' ordinarily, is not harm. Instead, harm is a deviation from what is considered ordinary."¹⁰⁰ She also points out that as various forms of the oppression of women have historically been accepted as social norms, this social reality in turn influences and even dominates our legal concepts of what constitutes harm.¹⁰¹ The effect of this social process over time is that the very pervasiveness of particular types of harm against women renders it normative, thereby difficult to legally accept as worthy of a significant or substantial judicial response.¹⁰² The very pervasiveness of forms of gender oppression (which can include racism), creates a social context that supports the belief that some degree of this phenomenon is inevitable, and therefore not within the calculus of a gross deviation from what is expected to be the pitfalls of normal existence. Thus, when fact-finders are asked to see the behavior of individuals who commit acts that are racist or sexist, as harmful, if they have even subtly accepted the "normativeness" of these practices either consciously or unconsciously, they must first make a cultural and social progression beyond their own experience and beliefs before the legal parameters of what must be done can become clear.

A parallel dilemma arises for the victims of discrimination when subtle, yet pervasive forms of racism are accepted as social norms. Because people of color inevitably develop the capacity to persevere in spite of assaults on their dignity, this very capacity can create the impression that the emotional harm that they experience is not severe.¹⁰³ Similarly, on an internal level, this coping capacity can transform itself into a pattern of denial by victims of the severity of their trauma and become rationalized as a necessary adjustment to the harsh realities of life.¹⁰⁴ It is important for both advocates and fact-finders to understand this phenomenon in evaluating emotional harm. While society has made progress in changing old norms and valuing the experiences of people of color and

100. Suzanne J. Levitt, *Rethinking Harm: A Feminist Essay*, 34 WASHBURN L.J. 531, 532 (1995).

101. *Id.* at 532-33.

102. *See id.* at 537-38. Leavitt cites judicial responses to sexual harassment and spousal abuse cases as examples of social harm. *Id.* at 534-38. She attributes the slow and grudging acceptance/non-acceptance of these social harms into the traditional legal framework as background radiation, potentially worthy of attention, but basically like background noise, something that individuals are aware of, but learn to tolerate. *Id.* at 532-33.

103. *See, e.g.,* Landrine & Klonoff, *supra* note 33, at 146.

104. Goodman-Delahunty & Foote, *supra* note 61, at 185-87.

women, social science studies clearly demonstrate that more work still needs to be done.

II. THE POTENTIAL FOR BIAS BY JUDGES AND JURIES

A. Some Social Science Evidence

1. *Bias as a Form of Racism*

Whenever one begins a discussion of racial issues, it is critical at the outset to clarify language and definitions. Bias, or prejudice, as a general concept is a component of the set of beliefs or values that form the categories in which individuals view the world and organize the information acquired.¹⁰⁵ Forming these categories is a normal process and helps to psychologically process the myriad of information received.¹⁰⁶ These inputs are, for the most part, rational in that they are built upon accurate information.¹⁰⁷ The associations that individuals create from these categories tend to follow and reflect a normal pattern of logical thinking.¹⁰⁸

On the other hand, this process of creating categories also leads to the forming of clusters, and projecting the characteristics that are assigned to the cluster onto individual phenomena.¹⁰⁹ The most common result of this process occurs when attention is not paid to the details or particularities of the individual phenomena, and individuals unconsciously accept ideas based on the projection or juxtaposition that is applied from the category to the larger cluster.¹¹⁰ Ordinary bias results when this process presents an oversimplification of the world and a distortion or inaccuracy based on one's limited experience, inability, or aversion to see the illogic or incompleteness of those views.¹¹¹ The tendency is to at least initially form ideas about the world in keeping with first-hand experience, even though this may include projections of fantasy,

105. ALLPORT, *supra* note 36, at 6-14.

106. *Id.* at 27 ("[M]an has a propensity to prejudice. This propensity lies in his normal tendency to form generalizations, concepts and categories, whose content represents an oversimplification of his world of experience.").

107. *Id.* at 22. ("[G]enerally a category starts to grow up from a 'kernel of truth.' A rational category does so, and enlarges and solidifies itself through the increment of relevant experience.").

108. *Id.* ("Categories may be more or less rational . . . Scientific laws are examples of rational categories. They are backed up by experience . . . Even if the laws are not 100 percent perfect, we consider them rational if they have a high probability of predicting a happening.").

109. *Id.* at 20.

110. *Id.* at 21.

111. *Id.* ("This principle holds even though we often make mistakes in fitting events to categories and thus get ourselves into trouble.").

emotional issues, or information acquired and accepted through social and cultural influences.¹¹²

Racial bias, as the term is used here, is the extension of this process as it is formed and shaped by the historical and cultural patterns of race and racism in America.¹¹³ This social process has resulted in a distorted and stereotyped projection of a dominant and normative "I" and a different and subordinate "other" onto the categories of race.¹¹⁴ More importantly, racial bias is a reflection of a failing to bridge this gap by consciously accepting accurate information, which moves away from stereotypes and relies rigorously upon logical thinking and individualization.¹¹⁵

In 1954, Professor Gordon Allport, in his critical study, *The Nature of Prejudice*, advanced the theory that logical thinking is more often the norm for most Americans.¹¹⁶ In fact, up to eighty percent of white Americans harbored enough antagonism toward members of racial minority groups that it would likely affect their behavior

112. *Id.* at 27. It should also be noted that this pattern of thinking is not limited to whites as a dominant social group. Members of minority groups can also be biased based on their perceptions of other groups and their misapplication of false group characteristics to an individual. *Id.* at 38-39. Discrimination is distinguished here between interpersonal bias, which operates across racial, ethnic, and gender boundaries, and institutional bias, which is socially constructed by those who control the major social institutions in society. Bernice Lott & Diane Maluso, *Introduction: Framing the Question to THE SOCIAL PSYCHOLOGY OF INTERPERSONAL DISCRIMINATION*, *supra* note 29, at 2-3.

113. See generally JOHN HOPE FRANKLIN, *FROM SLAVERY TO FREEDOM* (7th ed. 1994), for a full historical treatment of racism in America. While the literature on race and racial discrimination in America is too voluminous to note here, one seminal work does stand out. *An American Dilemma: The Negro Problem and Modern Democracy* has been a foundation for work by modern scholars of all disciplines on racial discrimination. GUNNER MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* (1962). Myrdal's study chronicled the history and pervasiveness of discrimination and bias in American culture, and argued that until those issues were addressed America would never attain the status of a full and complete democracy. *Id.* at 1020-24.

114. ALLPORT, *supra* note 36, at 37, 41 (describing a person in-group and a personal reference group in contrast with "an outsider").

115. See Charles Lawrence, *The Id, Ego and Racial Discrimination: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987). Lawrence's theory suggests that individuals are infected by the biases inherent in a racist society. *Id.* Utilizing a psychoanalytical model, he argues that as long as society reflects racial domination and subordination in its social structure, individuals will be subconsciously influenced by these stimuli, and will tend to reflect them in various ways. *Id.* at 322-23. When this occurs, despite the best efforts toward objective thinking, all will subconsciously project the emotional and experiential issues that were referred to in Allport's work on prejudice. *Id.* at 337. This results in so-called "objective legal standards" actually being constructed on flawed, unconscious foundations. *Id.* at 344-45.

116. ALLPORT, *supra* note 36, at 17-27.

in some way on a daily basis.¹¹⁷ He viewed these findings as evidence supporting his theory on the social reproduction of racial bias.¹¹⁸ One significant aspect of Allport's early theories was that he did not see these distortions as in any way inevitable or linked to human nature.¹¹⁹ While he found evidence to explain racial bias as mostly affected by social and cultural variables that influenced and shaped attitudes, his theories were broad and eclectic enough to recognize the role of cognitive influences as well.¹²⁰

The importance of his dual perspective of cognitive and social factors is two fold. First, Allport focused on the social dimensions of racism, particularly how the reformation of social institutions that had been constructed along lines based on racial stereotypes could be restructured.¹²¹ But he did not see this as the only approach to attacking racism.¹²² He also recognized that the cognitive inputs that shape belief, perception, and consciousness are not intrinsic to human behavior.¹²³ Thus, he saw the social and cultural variables, reflected in racist beliefs and causing racist behavior as

117. *Id.* at 78.

118. *Id.* at 79. Allport moved away from theories that characterized racism as an aberrant individual psychosis and instead saw it as a distinctly social phenomena with deep historical origins. *Id.* at 208-13.

119. *Id.* at 17-19.

120. *Id.* at 165-77. While later cognitive theorists would expand considerably on Allport's work, his initial studies laid the framework for later experiments that demonstrated that racially biased beliefs did not always follow Allport's continuum and become discriminatory conduct. Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1186-88 (1995). In fact, the cognitive theorists argue that racial biases are often a set of unconscious constructs and beliefs. *Id.* at 1188. Behavior may then follow these cognitive pathways without ever manifesting as a rational or conscious decision of choice. *Id.* For an excellent discussion of these theories and how they demonstrate the counter-productive aspects of anti-discrimination law, especially the intent standard in Title VII jurisprudence, see *id.* at 1204-07.

121. ALLPORT, *supra* note 36, at 504-13.

122. *Id.* at 469, 477, 493, 495, 510 (describing how racism can be attacked by changing laws, a greater role for social scientists in government, and appropriate use of the mass media, particularly influential media, like film, individual therapy, and intercultural education).

123. See deCarvalho, *supra* note 60, at 299. Allport was critical of a purely psychoanalytic approach to prejudice because of its tendency to see discriminatory behavior as the reflection of "infantile, repressed, defensive, and irrational" parts of the human psyche. *Id.* at 303. Allport did accept some aspects of the psychoanalytic theory. *Id.* at 303-04. In particular, he saw the perpetrators of discrimination as often developing fears and aggressions that were turned against minorities, but he rejected the idea that these were impulses that might affect individuals. *Id.* at 304. He strongly urged the view that racial bias was more a situational construct, created by social forces and, therefore, more susceptible than the psychoanalytic construct to change through countering social forces. *Id.*

being susceptible to reformation through conscious social policy.¹²⁴ This theory, in fact, has supported the main public policy rationale underlying civil rights laws and enforcement efforts.¹²⁵ At the same time, while the more cognitive elements of his theory have been the subject of numerous social science research efforts, very little is known about how to translate those findings into broad, meaningful social results.¹²⁶ This may account for the fact that while beliefs about race in this country have undergone significant positive change, many forms of racially influenced behaviors have changed much more slowly, or in some cases very little at all.¹²⁷ The cognitive theorists who have been able to shed further insight on why information designed to dispel stereotypes and biases is not always reflected in a social context have drawn from and expanded on Allport's theory. They have pointed out how the changes in social structures, particularly those reflected in the law, are often removed from the day-to-day experiences of most citizens and do

124. *Id.* at 304-06.

125. For an example of a positivist approach to anti-discrimination echoing Allport's theory, see CHARLES WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* 1 (1985) ("The legal remedies [President Kennedy] have proposed are the embodiment of this nation's basic posture of common sense and common justice."); see also *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) ("we conclude that in the field of education separate but equal has no place."). There are numerous examples of a positivist approach to anti-discrimination principles that echo Allport's view that racial bias is learned behavior, reinforced by social conditions, but behavior that can and should be changed. The most influential is *Brown*, with its bold pronouncement that separate but equal was no longer consistent with the premise of the Fourteenth Amendment. *Brown*, 347 U.S. at 495. Another is Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(a)(1) (2003). Each represents a sweeping view of the potential for change, albeit a vision frequently unrealized.

126. See Krieger, *supra* note 120, at 1168-69 (arguing that the entire theoretical framework for the intent standard formulated by the Supreme Court in *Washington v. Davis*, 426 U.S. 229 (1976), and *Village of Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252 (1977), is based on a flawed understanding of how conscious decisions concerning race actually occur).

127. A dramatic example of this dissonance between attitudes and behavior has been chronicled in *American Apartheid*. In this extensive examination of housing patterns in the post Title VIII period, these authors have reluctantly concluded that African-Americans face high degrees of racial isolation in almost every major American city. MASSEY & DENTON, *supra* note 7, at 76. They also found that the vast majority of African-Americans support the ideal of integration. *Id.* at 88. They reported surveys of white Americans that revealed that by 1978, eighty-eight percent of whites supported the basic principle of non-discrimination in the housing market. *Id.* at 91. But white Americans "remain uncomfortable about its implications in practice and are reluctant to support legislation to implement it. Moreover, negative stereotypes about black neighbors remain firmly entrenched in white psyches." *Id.* at 92.

not automatically reproduce themselves as new beliefs and behaviors.¹²⁸

2. *The Impact of Cultural Bias*

Researchers from the National Opinion Research Center ("NORC") have sought to explain the discrepancy between attitudes about race and social behavior as the "lag effect theory."¹²⁹ This theory contends that as civil rights laws and changing social attitudes interact to form new social norms, there will always be a lag time between the belief in equality as a social ideal and a corresponding change in social behavior.¹³⁰ This "gap" means that while individuals are forming new ideas and value, they may continue to be influenced by older beliefs.¹³¹

Attitudes on matters of race have changed a great deal since the 1940s.¹³² More recent studies show that on many levels whites, as a group, are willing to reject many of the extreme stereotypes that have historically been common components of American culture and have strongly influenced white people's perceptions of people of color, particularly African-Americans.¹³³

128. For an excellent description of cognitive theory, see Krieger, *supra* note 120, at 1161-66. In analyzing the basic flaws in current Title VII jurisprudence, particularly its reliance on findings of intentional discrimination to justify a remedy, she describes how this standard is at odds with cognitive psychological theory. *Id.* at 1166-68. In summarizing cognitive theory, she points out that its key element is that people act on Allport's categories, also referred to as schemas. *Id.* at 1188. But, for the most part, individuals do so without a conscious awareness. *Id.* Since these behaviors lie outside general awareness, they are also rarely the object of institutional constructs. *Id.* at 1213-17. In other words, institutional racism is not seen, because individuals do not see themselves as racist. *Id.* In the Title VII field, this results in constructing a legal rule about intentional conduct that is inconsistent with what is known about human behavior. In Krieger's view, this results in a whole set of unconsciously motivated conduct that will never meet a conscious standard for intentional behavior. *Id.* at 1217. This flaw is compounded because the "racial blind spot" gets transformed into a rule supposedly designed to help find and respond to racial discrimination. *Id.*

129. See HOWARD SCHUMAN ET AL., *RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS* 135-36 (1985). The lag effect represents the time it takes for an expressed attitude to become internalized. *Id.* It is then that the individual's behavior is most likely to fall in synchronization with their expressed values. *Id.* The authors caution that this is a hypothesis drawn from the data and there are some studies that are inconsistent with this theory. *Id.* They point out that school integration shows an inverse relationship to the data, with the increase in implementation resulting in a decrease in attitudinal support. *Id.* at 136.

130. *Id.* at 135.

131. *Id.*

132. *Id.* at 193-95.

133. See *id.* For example, in 1958, only four percent of whites surveyed supported interracial marriage. *Id.* at 74-76. By 1983, that figure had increased to forty percent.

NORC has tracked these “racial attitudes” by utilizing research questionnaires that recorded the answers to a similar series of questions asked repeatedly from 1942 to 1983.¹³⁴ This method provided a reliable way of evaluating and comparing changes in attitudes over time. In areas such as views on interracial marriage, and willingness to accept African-Americans in neighborhoods, in schools, or social venues, the early responses all showed the depth of racial bias prior to the modern civil rights era.¹³⁵ They have also tracked the steady upward acceptance trend, demonstrating the moderation of open racial hostility and the formation of beliefs that reflect a rejection of, or at least a meaningful distancing from, racial stereotypes and biases.¹³⁶ In keeping with Allport’s early theories, these NORC surveys have led to the conclusion that many older racial stereotypes have given way to more accurate, non-stereotypical thinking about people of color.¹³⁷ More importantly for this analysis of race and emotional harm, this trend also reflects the upward trend in the ability of most whites to perceive African-Americans with the same degree of sympathy and empathy as they with other white people.¹³⁸ The data reveals a more

Id. While this is hardly an unqualified endorsement of a fully integrated society, it does illustrate the trend toward greater acceptance.

134. *Id.* at 45-46, 55.

135. *Id.* at 193.

136. *Id.* at 193-94

137. *Id.* at 193-95. In 1997, when asked how they felt about a relative marrying an African-American, sixty-seven percent of whites surveyed either opposed or strongly opposed the idea. Maria Krysan, *Comments on the 2002 Data Update to Racial Attitudes in America: Trends and Interpretations Revised Edition* (2002), at <http://tiger.uic.edu/~krysan/writeup.htm> (last visited Mar. 15, 2003). The most recent data from the 2000 survey shows opposition declining to thirty-eight percent. *Id.* In another attitudinal question, whites were asked how they felt about living in a neighborhood that was fifty percent African-American. *Id.* In 1990, forty-eight percent opposed or strongly opposed the idea. *Id.* In 2000, that figure went down to thirty-one percent. *Id.*

138. SCHUMAN ET AL., *supra* note 129, at 202. These NORC studies focused on residential integration, school integration, job treatment, public facilities, the political arena, personal relations, and general attitudes about African-Americans and current events. *Id.* at 47-48, 53. Unfortunately, many of the questions in the NORC survey were designed to examine the extreme forms of racism that were open, prevalent, and reflected the social policy of the day. They are less useful in discerning the more subtle aspects of racism. Nevertheless, their findings are a barometer of how deeply entrenched aspects of racial antipathy are in American culture. For example, in the housing arena, one question simply asked whether one supported the idea of a free market seller’s choice, even if that permitted racial discrimination, or a fair housing law that prohibited discrimination. *Id.* at 97. In 1972, only thirty-five percent of northerners supported fair housing, and by 1982, that number had risen to about forty-seven percent. *Id.* Southern responses lagged ten points behind those modest figures. *Id.* These studies also reflect the distinction in white people’s belief in equal-

complex and multi-dimensional picture about racial attitudes that supports optimism, but also gives some credence to the argument that perceptual bias remains strong and prevalent in our society, and that the key players in the judicial process can hardly be expected to be fully immune to it.

In 1980, a team of psychologists conducted a review of a number of studies on unobtrusive discrimination and prejudice.¹³⁹ The value of their work, as it applies to the arguments in this Article, lies in two key areas. First, they carefully reviewed a vast body of literature in the field of racial studies generally focusing on those that sought to measure the current level of anti-black prejudice and discrimination among whites.¹⁴⁰ Second, they employed a definition of racism that is very close to the definition of racial bias extrapolated from Allport's work and employed in this Article.¹⁴¹ Their findings correlate closely with the thesis of this Article that perceptual bias remains strong in society and is, therefore, likely to be present in the process of assessing how an African-American plaintiff may have been harmed by discrimination.¹⁴² In their review of the literature on cross-cultural racial perceptions, the authors reiterated the findings supported by the NORC polling data that "anti-black attitudes were prevalent and moderately strong among the white population as a whole at least until the late 1950's and early 1960's."¹⁴³ They point out, however, that new surveys and studies from 1963 through the 1970s generally interpreted the NORC data

ity as a principle, versus their support of concrete policies to enforce that principle. For example, more than ninety percent of whites currently support the principle of equal treatment in employment, jobs, schools, and public accommodations, but the figures for support for government action to enforce that principle are considerably lower. *Id.* at 135. Two other trends emerge. The more interpersonal the proposed integration, the less support there is for government enforcement. *Id.* at 136. Conversely, there is more support for public activities, such as public accommodations. *Id.*

139. Faye Crosby et al., *Recent Unobtrusive Studies of Black and White Discrimination and Prejudice: A Literature Review*, 87 *PSYCHOL. BULL.* 546, 546 (1980).

140. *Id.*

141. *Id.* at 546.

Racism has been defined in a variety of ways. For clarity of exposition, we follow P. Katz and define racism as the differential treatment of individuals on the basis of their racial group membership. Racism may be examined at two levels: One may measure discriminatory behavior, and one may infer prejudiced attitudes. Stereotyping, which involves the presumption of certain attributes in an individual solely on the basis of racial groups, is one form of prejudice.

Id. (citations omitted).

142. *Id.* at 547.

143. *Id.* at 547-48

as revealing a significant decrease in racist attitudes and a significant increase in pro-integrationist and racially unbiased views.¹⁴⁴ This led to a number of other studies that concluded that diminishing racial prejudice in society was a definite trend, and some even to argue that "antiblack prejudice was no longer pervasive in the American white population."¹⁴⁵ They also found, however, that many of these studies relied on self-reporting, typical of questionnaire data, and were contradicted by other studies that demonstrated a dissonance between reported attitudes about race and actual behavior in racially integrated settings.¹⁴⁶ One study, for example, showed that college-age white women registered no prejudice on a questionnaire, but when they believed that the questionnaire would be the basis for actually assigning roommates, they showed significantly more prejudice towards African-Americans.¹⁴⁷

The unobtrusive discrimination studies that they conducted sought to resolve these discrepancies between values and behavior by examining experiments that fell into three categories: (1) helping behavior studies; (2) aggression studies; and (3) nonverbal behavioral studies.¹⁴⁸ In addition, they reviewed a number of laboratory experiments that were difficult to classify, but were designed to measure how race affected the perceptions of white test subjects.¹⁴⁹ Each of these studies would measure the level of empathy white subjects exhibited toward African-Americans. In the helping studies, staged scenarios were acted out with a white actor in need of assistance, and the identical situation was replayed where the actor was an African-American.¹⁵⁰ Their results demonstrated a clear preference among the white subjects for providing more assistance to the white actor.¹⁵¹ The aggression studies involved laboratory experiments where white test subjects had an opportunity to express aggression toward an African-American or white participant who was the target in a setting that was designed to allow for aggressive behavior to be socially acceptable.¹⁵² These

144. *Id.* at 548.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* at 547.

149. *Id.* at 549-56.

150. *Id.* at 548.

151. *Id.* at 549.

152. *Id.* at 552. These studies involved role playing where the subject played the role of a teacher and the student, who was really part of the experiment, could be given a bogus electrical shock based on the number of errors they made in the

were teacher/student scenarios where the person in the role of teacher could mete out mild punishment if the student gave incorrect answers.¹⁵³ Despite recording some discrepancies in the findings, their conclusion was that “retaliation, censure and anonymity all affect aggression against black targets, but fail to affect aggression against white targets.”¹⁵⁴ In other words, if the behavior of the white “teachers” was subject to censure or retaliation, they moderated their response to the African-American subject, but not the white one. These results suggest a tendency to mask one’s true feelings as long as there are likely negative consequences, but carry out aggressive responses when there were no likely consequences. Furthermore, “[t]he data imply that anti-black hostility was pervasive, but subtle . . . [a]ssuming that these subjects are representative of the general population, we may conclude that whites today continue to harbor covert hostility toward blacks.”¹⁵⁵ When the conditions were safe (for example, anonymous), with no censure from peers or authority figures, and no possibility for retaliation by the subject, the hostility was more overt and showed as a tendency to increase the level of direct aggression.¹⁵⁶ When safe conditions were not present, the hostility was more indirect.¹⁵⁷

The conclusions from these and other findings provide further support for the thesis of this Article, that clearly documented and measured bias in the general population must, to some degree, find a corresponding reflection in the judicial process that may have an impact on how the harm caused by discrimination is perceived and valued.

Another key factor derived from these studies is not simply that whites tend to perceive African-Americans as different from themselves, but that the difference becomes an internalized rationale and justification for different and often harsher treatment.¹⁵⁸ While the courtroom setting of a discrimination case does not in-

teacher/learner scenario. *Id.* at 552-53. In certain cases, the student role was played by a white person and in others by an African-American. *Id.* The intensity of the shock was a measure of direct aggression, and the duration was a measure of indirect aggression. *Id.*

153. *Id.*

154. *Id.* at 554.

155. *Id.*

156. *Id.*

157. *Id.*

158. This Article is merging the theories of Allport on the formation of categories and stereotyped labeling and the studies of Crosby, Bromley, and Saxe that support Allport’s theory of the social and historical influences of racial bias on the formation of those categories. See Crosby et al., *supra* note 139, at 548-56.

volve the anonymity of some of the experiments, the social distances among the players in the judicial process and the rigidity of the roles and lines of authority are analogous in many ways to the test conditions where white test subjects were in positions of authority over an African-American, and their actions were not subject to supervision or sanction.

Other findings demonstrate additional support that the conscious and unconscious perceptions of white fact-finders are literally and figuratively colored by biases derived from social and cultural institutions.¹⁵⁹ These perceptions are inevitably brought into the courtroom process and may easily become manifest during the trial, including the damages phase of the case, when empathy towards the victim is so crucial to their assessment of the degree of harm suffered.¹⁶⁰

Evidence from other studies found that in a teacher/student role-play, whites expected to be treated more harshly by African-Americans who assumed the teaching (authority) role than by whites in a similar role.¹⁶¹ In a shoplifting study, where an African-American person and a white person acted out an identical shoplifting scene, the whites who observed the encounter were more likely to spontaneously report and confirm the crime when the actor was an African-American than when they observed the white actor in the identical behavior.¹⁶² Another study measured friendliness toward a subject in an intercom experiment.¹⁶³ When the test subject

159. See, e.g., Krieger, *supra* note 120, at 1188.

The second claim posited in social cognition theory is that, once in place, stereotypes bias intergroup judgment and decisionmaking. According to this view, stereotypes operate as "person prototypes" or "social schemas." As such, they function as implicit theories, biasing in predictable ways the perception, interpretation, encoding, retention, and recall of information about other people. These biases are cognitive rather than motivational. They operate absent intent to favor or disfavor members of a particular social group. And, perhaps most significant for present purposes, they bias a decisionmaker's judgment long before the "moment of decision," as a decisionmaker attends to relevant data and interprets, encodes, stores, and retrieves it from memory. These biases "sneak up on" the decisionmaker, distorting bit by bit the data upon which his decision is eventually based.

Id. She further indicates that empirical evidence shows that people's access to their own cognitive processes is poor. *Id.* Accordingly, cognitive bias may well be both unintentional and unconscious. *Id.*

160. See Schwemm, *supra* note 22, at 107.

161. Crosby et al., *supra* note 139, at 554. This perception is important because it suggests a deeply rooted psychological rationale for their own bias, for example, my treatment of "them" cannot be so bad because they would do the same to me. *Id.*

162. *Id.* at 554-55.

163. *Id.* at 555.

thought the intercom partner was white, the verbal friendliness rating was positive.¹⁶⁴ When they thought the partner was African-American, the friendliness rating was negative.¹⁶⁵ In an interview study, similar results were recorded.¹⁶⁶ If the interviewee was perceived as African-American, the subjects sat further away from the interviewee, made more verbal errors, and terminated the interview sooner than if the same scenario was acted out with a white interviewee.¹⁶⁷ Finally, an experiment utilized a videotape that contained African-American and white actors playing out identical scripts that depicted two males in an interaction that culminated in one shoving the other.¹⁶⁸ The African-American harm-doer was perceived by white subjects as violent, but when the roles were reversed, the white harm-doer was perceived as "playing around."¹⁶⁹ In this study, the white subjects also assigned personality attributions to the African-American harm-doers, but described identical behavior by the white actor as situational.¹⁷⁰ Each of these studies, except the shoplifting experiment, were conducted in laboratory settings and the subjects all reported themselves on questionnaire surveys to be liberal.¹⁷¹ The shoplifting study, however, carried the added value of closely duplicating a typical life event without the artificial qualities of a lab and its findings were consistent with the lab studies.¹⁷²

There are three inescapable conclusions to be drawn from these studies. First, non-verbal behavior generally lies outside conscious awareness and therefore control is driven by perceptions and biases that each individual brings to a situation.¹⁷³ This partially explains the difference between the liberal self-identification of the test subjects, the positive diminishing bias trend in racial attitudes

164. *Id.* (noting that friendliness was measured by a scientifically accepted voice interpretation test).

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* at 556.

170. *Id.*

171. *Id.*

172. *Id.* at 555.

173. *See* Krieger, *supra* note 120, at 1190. She notes that: categorical structures—whether prototypes, stereotypes, or schemas—bias what we see, how we interpret it, how we encode and store it in memory, and what we remember about it later. In intergroup relations, these biases, mediated through perception, inference, and judgment, can result in discrimination, whether we intend it or not, whether we know it or not.

Id.

reflected in questionnaire surveys, and the behavior results recorded in the unobtrusive bias studies. Secondly, whites still structure many aspects of their behavior on the basis of psychologically rooted biases against African-Americans, and do so in ways that are beyond their awareness.¹⁷⁴ Finally, although there has been a marked improvement in the social compliance with the new social norms of non-discrimination depicted in our laws, many whites have not internalized these values and made them part of their conscious behavior patterns.¹⁷⁵ As a result, many whites are still overly dependent on external control inputs to achieve truly non-biased conduct.¹⁷⁶ While social control is one of the functions of our civil rights laws, the conduct of judges and juries do not operate for the most part, as subjects of those controls.¹⁷⁷ The personnel within our judicial system are much more dependent on the guidance of their own consciousness, or the limited influence of plaintiffs attorneys in awakening that consciousness as they try and grapple with the complexities of a trial, including the unknown perceptions of white decision-makers.

There are several possible mitigating factors that should be considered in examining the degree that perpetual biases can potentially infect the judicial process. Many of the studies cited above were conducted in the 1970s. If the survey data is accepted as accurate, it means that the NORC trends toward greater racial awareness and liberalization will have continued for the last twenty-five years, and the process of white internalization of non-racist views will have continued to move in a positive direction. Some of the same studies that measured covert white hostility toward African-Americans also documented how this learned behav-

174. Crosby et al., *supra* note 139, at 556-57.

175. *Id.* at 557-59.

176. *Id.* at 556-57. The Crosby study draws three useful conclusions. First, despite the differences between attitudes and behavior about race, positive changing attitudes project a progressive, though not always consistent trend. *Id.* at 560. Secondly, whites are not the only group in society affected by bias. *Id.* Nevertheless, white institutional authority remains stronger than institutions controlled by African-Americans. See ANDREW HACKER, TWO NATIONS, BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL 22-23 (1995). Third, change from overt racism to subtle racism is a positive change. Crosby et al., *supra* note 139, at 560. "[W]hites have begun to comply with an egalitarian and non-racist ideology." *Id.* One can be hopeful "that internalization follows." *Id.*

177. See generally Krieger, *supra* note 120, at 1186-88. Her thesis is that our employment discrimination laws, with their requirement that the victim of discrimination prove that the employer acted intentionally, assumes that we are always aware of the motivation that causes our behavior. *Id.* at 1185. This, she points out, is contrary to the theories and findings from numerous cognitive psychological studies. *Id.* at 1187.

ior reflecting bias could very rapidly be unlearned, or at least controlled, at a behavioral level.¹⁷⁸ When non-racist behavior was modeled under the same conditions as the aggressive behavior teacher/learner tests, the white subjects not only moderated their overt discrimination, but there was no discernable shift to more covert behavior.¹⁷⁹ In other words, the principles and practices of equality can be learned and internalized into new behavior patterns with consistent institutional oversight and support. Another test showed that when there was open censure of discriminatory behavior, or the potential for that censure on the white test subject, both overt and indirect aggression was moderated.¹⁸⁰ These findings suggest that even reluctant whites can be brought around to non-racist behavior through an institutional approach that vigorously and actively promotes those values and carefully monitors transgressions. Judicial studies on the status of minorities and women in the courts are positive examples of such an effort.¹⁸¹ While it may still be too soon to determine the degree of change that has been brought about by those efforts, they represent an awareness that eliminating bias requires a conscious and consistent effort. As laudable as these efforts are, it is not at all clear whether they have had sufficient reach into the profession and the judiciary to mitigate broader social trends from the nation's deeply rooted racial past.

B. Evidence of Racial Bias in Tort Litigation

Since the Supreme Court formally linked recovery for emotional harm in housing discrimination cases to the dignitary tort of intentional infliction of emotional distress, the field of tort law is a likely source for insights into the presence of racial bias in the judicial process. This is a particularly salient field since both discrimination cases and tort litigation focus on the degree and value of the injury suffered by the plaintiff. Two recent commentators have offered evidence of two forms of racial bias in the field of tort law. One is structural, where the preference for formal economic determinants translates the reality of lower earnings for African-Americans into a projection of future potential worth.¹⁸² The other is a more sys-

178. Crosby et al., *supra* note 139, at 552.

179. *Id.* at 554.

180. *Id.*

181. See, e.g., 1 REPORT OF THE NEW YORK STATE JUDICIAL COMMISSION ON MINORITIES, EXECUTIVE SUMMARY 1-9 (1991).

182. See Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463, 480-89 (1998) (arguing that the basic categories of physical

temic bias that supports this Article's thesis of racial misperceptions leading to a chronic undervaluing of African-American suffering.¹⁸³ The structural bias in the process of valuing African-American claims is depicted in the process of utilizing economic data to extrapolate an "objective" measure of the worth of an injury.¹⁸⁴ This process inevitably captures the lower earnings of African-Americans, which at a societal level is directly linked to discrimination, and projects that figure into potential future earnings as if all the discriminatory disabilities of the past and present must inevitably continue into the future.¹⁸⁵ The racial blind spot, represented by the inability of many white jurists to see this as a perpetuation of past discrimination and to take steps to eliminate it, is another example of how the African-American plaintiff is perceived through a racially skewed reality.¹⁸⁶ The available data confirms the detrimental economic effects of the continued use of this standard. In one study, even after adjustments to account for different diseases, general occupation, and age, awards for African-American plaintiffs were significantly lower than for similarly situated whites, and in another, averaged only seventy-four percent of the average white award.¹⁸⁷

The systemic bias in the field of tort litigation raises different issues than those confronted in most housing discrimination cases. In some key aspects, however, they are related. In the typical FHA case, the plaintiff will only receive compensation if she proves that she suffered harm, and that it was caused by the conduct of the

injury, property damage, emotional harm, and related harm all reflect deep gender and racial biases that tend to go unnoticed and unchallenged because they are based on traditional white middle class male norms ranging from the reasonable man to comparative actuarial tables).

183. See Frank M. McClellan, *The Dark Side of Tort Reform: Searching for Racial Justice*, 48 RUTGERS L. REV. 761, 774-77 (1996) (offering data and examples of racial bias in the courts, the personal injury bar, and the law itself, all of which operate to the disadvantage of African-American plaintiffs and frequently result in the devaluation of their claims).

184. See Martha Chamallas, *Questioning the Use of Race Specific and Gender Specific Economic Data In Tort Litigation: A Constitutional Argument*, 63 FORDHAM L. REV. 73, 75 (1994) (arguing that the persistent use of economic data that explicitly utilizes gender and racial classifications is an unjustifiable racial classification, and is therefore unconstitutional). She further points out the failure of the law to address the discriminatory effects of job bias, and the continuation of those disabilities into so called objective measures of lost future earning potential, reflecting not only a racial bias in the legal process itself, but continuing support for that bias by judges who refuse to be receptive to alternative formulations. *Id.* at 75-77.

185. *Id.* at 75.

186. Chamallas, *supra* note 182, at 489.

187. Chamallas, *supra* note 184, at 87.

defendant.¹⁸⁸ As in the typical tort case, some elements of harm are relatively straightforward.¹⁸⁹ But proving the elements of emotional harm in the damages phase of a housing discrimination case, as in its tort counterpart, involves more than just presenting factual evidence. It also involves getting judges to understand the case from the perspective of the plaintiff even though emotional harm from discrimination is probably far removed from both their experience and their knowledge.¹⁹⁰ While both civil tort and Title VIII litigation require direct evidence that emotional harm occurred, the evaluation of that evidence and the assignment of a monetary value to it require some understanding and insight into the manner in which racial discrimination operates.¹⁹¹ The fact-finders must develop a degree of empathy that permits them to evaluate the experience of discrimination from the perspective of a person of color. This does not mean uncritically accepting each of the plaintiff's assertions as true, but neither can it begin with extreme skepticism about whether discrimination is little more than mildly embarrassing or inconvenient.¹⁹² When these cases are viewed in context, a fuller sense of the real extent of the harm that results from discrimination can emerge, and a more accurate and meaningful value can be assigned to the harm. Getting fact-finders to reach that point brings into question issues of perspective, experience, comprehension, and empathy, as well as all the traditional legal skills that plaintiff's attorneys must employ to present their evidence.¹⁹³ Unfortunately, what the data from a critical race perspective on tort litigation reveals is that far too often the depth of understanding for full fairness for persons of color in the process is lacking, and the steps necessary to achieve a better understanding are not being taken.¹⁹⁴ Other studies of tort litigation have found

188. DOBBS, *supra* note 50, at 1047-53.

189. SCHWEMM, *supra* note 18, 25-32.

190. McClellan, *supra* note 183, at 794.

191. Schwemm, *supra* note 22, at 121 ("intangible factors will often influence the judge or jury").

192. While considerable progress has been made, skepticism as well as possible bias still may influence low jury awards. See Schwemm, *supra* note 22, at 106-07.

193. See Arlene Sheskin, *Trial Courts on Trial: Examining Dominant Assumptions*, in *COURTS AND JUDGES* 77, 79-82 (James A. Cramer ed., 1981) (describing courtroom hierarchy affecting decision-making).

194. McClellan, *supra* note 183, at 771. He points out that "[t]he widely shared perception of people of color regarding the pervasiveness of the color line issue are sufficient grounds for discussion of the issue," and he calls for racial orientation and sensitivity training for judges. *Id.* at 771, 794. Professor McClellan calls for systematic empirical studies to examine issues of differential treatment of African-Americans, particularly in the tort system. *Id.* at 772-73.

systemic gender bias in the judicial process as well.¹⁹⁵ As Professor McClellan points out, “unfortunately, race often precludes close empathy with members of other races in tort cases. Race also influences one’s view of what is ‘outrageous conduct.’”¹⁹⁶

C. The Institutional Devaluation of African-American Life: Death Penalty Examples

One of the most dramatic examples of how facts can be distorted when they are examined through a racial prism, occurred with the Supreme Court’s decision in *McCleskey v. Kemp*.¹⁹⁷ In analyzing the claim of systematic racial discrimination in capital sentencing, the Court’s decision turned in significant part on their review of a statistical analysis of the impact of race on the likelihood of capital punishment, later to be known as the Baldus study.¹⁹⁸ This statistical analysis demonstrated that when capital sentencing is evaluated even from the perspective of the criminal law’s goal of retribution, the practices of Georgia prosecutors demonstrated that the value to society of the loss of a white life was four times that of the loss of an African-American life.¹⁹⁹ A fuller review of race discrimination in the criminal justice system is beyond the scope of this Arti-

195. In summarizing this finding from a number of judicial commissions, Professor Judith Resnick quotes from a report by one such body in New York. “The perception is that minorities are stripped of their human dignity, their individuality and their identity in their encounters with the court system[.]” Judith Resnick, *Ambivalence: The Resiliency of Culture in the United States*, 45 STAN. L. REV. 1525, 1534. She adds that “[p]hrases like ‘there is evidence that bias occurs with disturbing frequency at every level of the legal profession and court system’ are uttered, repeated, printed, pronounced, but without much in terrorem effect.” *Id.* She also notes that “[u]nexplained disparities in treatment correlate with membership in minority groups and even with gender.” *Id.* at 1533.

196. McClellan, *supra* note 183, at 786.

197. 481 U.S. 279 (1987).

198. *See id.* at 286; Evan Tsen Lee & Ashutosh Bhagwat, *The McCleskey Puzzle: Remedying Prosecutorial Discrimination Against Black Victims in Capital Sentencing*, 1998 SUP. CT. REV. 145, 146 (1998). “McCleskey’s primary evidence in support of this claim was the so-called Baldus study, a sophisticated statistical analysis performed by Professors David C. Baldus, Charles Pulaski, and George Woodworth of the role played by race in capital sentencing proceedings in Georgia in the 1970s.” *Id.* “The results of the Baldus study are striking. The race of the victim was an overwhelmingly important indicator of the likelihood that a capital sentence would be imposed.” *Id.* at 147. “After controlling for the thirty-nine most relevant nonracial variables, murderers of whites were 4.3 times as likely to receive a death sentence as murderers of blacks.” *Id.* While this data was used to demonstrate the discriminatory application of capital sentencing, it also underscores the diminished value of the African-American victim. *Id.* at 148.

199. *See id.* at 149. “[W]e claim that the statistics create a strong suspicion of race discrimination—specifically, an overvaluation of the white victim’s life.” *Id.* at 168.

cle. Yet, it is difficult to imagine how judges and juries in the civil system can fully comprehend the reasonable measure of the harm caused by discrimination when they are surrounded by daily examples of racism reinforced by the institutionally accepted diminished value of an African-American's life represented by the *McCleskey* example.²⁰⁰ The skewed social perspectives that are exhibited in countless criminal cases because of race suggest that seeing an African-American in a whole, complete, human dimension, considering only that individual's faults and virtues, is truly one of the casualties of racial discrimination in our society.²⁰¹

D. Evidence of Unconscious Bias by Judges

In 1968, a group of Mexican-American activists were charged with violating the California Criminal Code.²⁰² As part of their defense strategy they challenged the composition of the grand jury that had issued the indictments, alleging that there was racial bias in the selection of the grand jury in violation of the Equal Protection Clause.²⁰³ During the subsequent trial, an unusual event occurred.²⁰⁴ At that time, the California court system allowed judges to select from the grand jury pool those who would actually serve as grand jurors.²⁰⁵ In the suit brought on behalf of the Mexican-American activists, the judges who had participated in that selection process had to respond to the allegations that they had committed acts of discrimination.²⁰⁶ There was no factual dispute that almost all the Mexican-Americans in the pool were passed over.²⁰⁷ The critical issue was whether the conduct of the judges demonstrated the required discriminatory intent to meet the standard established by the Supreme Court in *Washington v. Davis*.²⁰⁸

200. The term institutional racism is used in a sociological sense, which is obviously different from the accepted legal rules that define "discrimination" in their various judicial contexts. See Crosby et al., *supra* note 139, at 554.

201. For a comprehensive analysis of the impact of race on the criminal justice process, see RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* (1997).

202. Ian F. Haney Lopez, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717, 1721 (2000).

203. *Id.* at 1722.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* at 1832. In *Washington v. Davis*, the Court distinguished between laws that had a discriminatory impact on a protected class and those that had an adverse impact on a protected class but were formulated with a discriminatory motive. 426 U.S. 229 (1976); Lopez, *supra* note 202, at 1832. It held that motive, or intent was a necessary element in order to make out a prima facie case of an Equal Protection Clause viola-

During the trial, more than one hundred judges testified under oath about the criteria that they used in their selection process.²⁰⁹ While the equal protection claim was ultimately and predictably unsuccessful, the testimony of the judges provided a unique picture of the operation of racial bias in the judicial process. The transcripts of thirty-three of the judges were reviewed by Professor Lopez and revealed that when each judge was asked if their actions were motivated by any intent to discriminate against the potential Mexican American grand jurors, they each denied any discriminatory motive.²¹⁰ In stating this emphatic denial, they were probably all aware that for a plaintiff to establish a *prima facie* case of discrimination, she had to show that the discrimination was intentional and not the result of non-racially motivated influences.²¹¹ In fact, many of the judges may have honestly believed themselves and their process to be completely unbiased.²¹²

But despite their testimony, it is difficult to reconcile the contradiction between their behavior, its results, and their perception of their conduct. Professor Lopez saw in this transcript a rare opportunity to examine the behavior of an aggregate of judges who influence the operation of the criminal justice system throughout a county.²¹³ He argued that to understand their conduct more fully, the inherently rationalizing "intent" standard has to be examined.²¹⁴ In critiquing the manner in which courts have embraced this rule, he explained the inherent deficiency in the standard through a theory from the field of social psychology called institutional analysis.²¹⁵ It:

reveals that racism occurs through the purposeful embrace of racial institutions, but also through the non-conscious subscription to racial background understandings and practices. In the latter instances, explicit references to race occur infrequently; to

tion. *Davis*, 426 U.S. at 239; see *Village of Arlington Heights v. Metro. Hous. Corp.*, 429 U.S. 252, 265 (1977).

209. Lopez, *supra* note 202, at 1722.

210. *Id.* at 1730-47, 1757-61, 1845-76.

211. *Id.* at 1786.

212. More recently, an article directed to defendants in Title VII cases advised that since the law itself focuses only on behavior, that white defendants should not be concerned about any "private" attitudes or feelings that they have about race. Stanley L. Brodsky et al., *Racial Inquiries in Depositions and Trials*, 26 J. PSYCHIATRY & L. 533, 536 (1998). In fact, white defendants are advised by some authors that "one can hold a variety of private racial attitudes and not act in a discriminatory manner." *Id.*

213. Lopez, *supra* note 202, at 1722.

214. *Id.* at 1833.

215. *Id.* at 1723-28, 1825-44.

the contrary, emphatic, heartfelt denials of racist motives often accompany institutional racism. Moreover, institutional analysis shows that remedying nonintentional racism requires openly addressing the role of racial institutions in human cognition. To end non-conscious reliance on racial institutions requires frank references to race; without such attention, racial institutions will persist, unrecognized but prevalent.²¹⁶

He further argues that some of the fault for the continuation of this type of discrimination lies in the structure of the anti-discrimination laws themselves.²¹⁷ For example, the intent standard reveals a striking contradiction between the law's definition of discrimination as a consciously motivated act, and the well-documented social/psychological studies that reveal subtle, but significant biases more often lie beneath the surface of these conscious acts, but are no less determinative of behavior than if they were based on obvious logical choices.²¹⁸ The thirty-three judges in the Lopez study were first blinded by the unconscious nature of their views on Mexican-Americans, but this denial was further legitimized and reinforced by a legal standard that explicitly excluded any deeper analysis. It is precisely this deeper inquiry that is essential to equip fact-finders with the ability to see the full impact of emotional harm that results from discrimination.

Psychological theories of cognition and behavior support the argument that as long as the culture contains innumerable elements of racism and they are not met with a consistent and evolving counterforce, those factors will continue to be reflected in cognitive functions.²¹⁹ Until recently, there has been a distinctive disso-

216. *Id.* at 1838.

217. *Id.* at 1757-64. Professor Lopez's article is a cogent critique of the contradiction between the legal standard of intent in Equal Protection cases and the unconscious behavior patterns that have been documented in institutional theory. *Id.*

218. *Id.*; see Krieger, *supra* note 120, at 1167.

[D]isparate treatment jurisprudence—indeed the entire normative structure of anti-discrimination law—is based on an assumption that decisionmakers possess “transparency of mind,” that they can accurately identify why they are about to make, or have already made, a particular decision. According to this view, if an employee's protected group status is playing a role in an employer's decisionmaking process, the employer will be aware of that role, even if he is not honest (or careless) enough to admit it. Equipped with conscious self-awareness, well-intentioned employers become capable of complying with the law's proscriptive injunction not to discriminate. They will monitor their decisionmaking processes and prevent prohibited factors from affecting their judgments.

Id.

219. Krieger, *supra* note 120, at 1174-77.

nance between the legal structures and institutions and what is known about human cognition, decision-making, and behavior.²²⁰ Legal rules, like the intent standard, have been premised on the belief of a rational, knowledgeable decision-maker. In fact, this premise of rationality is central to the operation of our legal system. Whether one functions as judge or member of a jury, she is assumed to be able to carefully review evidence, filter out extraneous signals, including any biases, and reach rational conclusions.²²¹ What social science studies have demonstrated, and what many people of color involved in the legal system have been arguing for years, is that the filtering out of racial stereotypes and biases is seldom as simple, logical, and direct, as a voir dire instruction to be fair and open-minded.²²² Whether this process is analyzed through the behaviorist theories of bias,²²³ or more recent cognitive theories,²²⁴ or institutional analysis,²²⁵ the results for victims of housing discrimination and other forms of bias are the same. Without a more open awareness and willingness to accept the passive nature of racial bias, their actual experience and the real effects of discrimination on persons of color cannot be fully accepted, understood, appreciated, or valued though monetary compensation.

III. ADDRESSING EMOTIONAL HARM THROUGH LITIGATION

A. Cycles: The Persistence of Discrimination in the Housing Market

In many ways, this Article has been discussing the effects of a series of cycles. On a macro level, there is a cycle that begins with segregated living patterns and the natural tendency to stereotype, which in turn fosters prejudice, leading to discrimination and a perpetuation of segregated living. Left unabated, the cycle is self-perpetuating, deeply troubling, and at the root of many of society's most persistent problems.²²⁶ At its core, this cycle is based on ignorance.

220. Lopez, *supra* note 202, at 1757-64.

221. Krieger, *supra* note 120, at 1167.

222. See, e.g., DERRICK BELL, *AND WE ARE NOT SAVED* 3-10 (1979); DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL* 1-14, 111-14 (1992). Both these volumes offer an extensive critique of the alleged racial neutrality of the law and the ameliorating effects of the application of the last forty years of our civil rights laws.

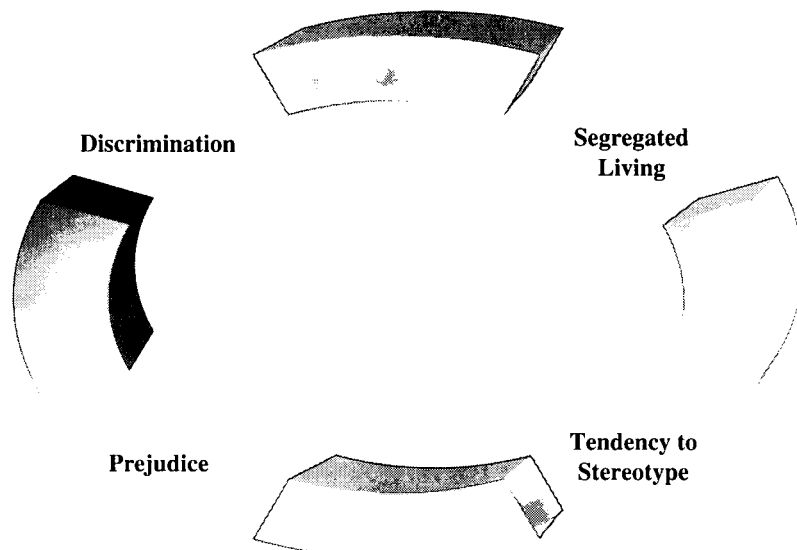
223. ALLPORT, *supra* note 36, at 206-18.

224. Krieger, *supra* note 120, at 1186-1211.

225. Lopez, *supra* note 202, at 1785-1806.

226. For an interesting social science overview of the impact of housing discrimination on education, employment, and poverty, see JOHN YINGER, *CLOSED DOORS, OP-*

Figure 1
Cycle of Ignorance



To be sure, there are many forms of ignorance, including that peculiar variety that is racial bias. Regrettably, there are some in society whose fear and even loathing of those different from themselves may never be ameliorated with more accurate information or sustained, diverse personal contacts. It is possible, however, that education and an awareness of important, reliable information can cultivate understanding for a meaningful number of those who grapple in one way or another, with the vestiges of racism.²²⁷ That belief leads to this inquiry and an attempt to unpack the cycles of

PORTUNITIES LOST: THE CONTINUING COSTS OF HOUSING DISCRIMINATION 135-58 (1995); see also MASSEY & DENTON, *supra* note 7, at 1-16 (noting the importance of location in residential real estate as affecting prospects for property value appreciation, access to quality education and municipal services, as well as other measures of upward mobility that are often the reward, at least for whites, for financial success).

227. See Gordon Allport's conception of racist behavior as being susceptible to reformation through conscious social policy. See *supra* notes 117-125; see also Jack Greenberg, *Affirmative Action in Higher Education: Confronting the Condition and Theory*, 43 B.C. L. REV. 521, 562 (2002). Professor Greenberg compares intermarriage rates between whites and African-Americans in the general population with the rate among those who have served in "the armed forces, the most thoroughly integrated institution in the United States." *Id.* The comparison is one measure of the extent to which diverse personal contacts and more integrated living patterns lead to significant changes in race-related behavior. Greenberg cites to a study by the noted University of Michigan demographer, Reynolds Farley, who "found that white men who have served in the military were three times more likely to marry black women as white men who never served. White women who served in the military were seven times as likely to marry black men as white women who were lifelong civilians." *Id.*

ignorance that have manifested in an inability for many, to receive full and fair compensation for the emotional injuries that flow from housing discrimination.

The widespread persistence of segregated living patterns in our society is self-evident to most casual observers. The work of Massey and Denton confirms in empirical terms what most objective observers can easily gather from a drive through their hometown.²²⁸ In an environment where one rarely has any sustained contact with the "other," racial bias, drawn from the prevalence of negative stereotypes, often takes a strong hold.²²⁹

Prejudice in white communities and the housing discrimination upon which it is based remains commonplace.²³⁰ Social science survey evidence indicates that neighborhood preferences among whites present a significant barrier to stable integration. A 1992 Detroit survey provides a useful illustration. The Detroit survey found that four percent of whites would leave a neighborhood that became seven percent African-American, fifteen percent of whites would move if the percentage of African-American residents rose to twenty percent, and twenty-eight percent would flee if African-American integration reached one third.²³¹ A survey performed by NORC in 1990, indicates that the Detroit survey is representative of national norms.²³²

These figures stand in sharp contrast to the survey evidence regarding the residential preferences of African-Americans which indicates a willingness to live in multi-cultural settings.²³³ The same Detroit survey found that while most African-American respondents prefer to live in a neighborhood that was at least fifty percent African-American, nearly all would be willing to live in an integrated neighborhood where the African-American population was as low as one third.²³⁴ Perhaps even more important is evidence from the same survey that twenty-eight percent of African-Ameri-

228. MASSEY & DENTON, *supra* note 7, at 86, 89, 93.

229. See Maluso, *supra* note 29, at 72-75 (analyzing the studies on reducing bias that have shown positive results, including cross racial interactions of persons of equal status, the importance that the interactions be sustained, the exposure of whites to high status African-Americans, and the addition of interracial classrooms and interracial learning teams).

230. MASSEY & DENTON, *supra* note 7, at 92.

231. Reynolds Farley, *Neighborhood Preferences and Aspirations Among Blacks and Whites*, in HOUSING MARKETS AND RESIDENTIAL MOBILITY 168 (G. Thomas Kingsley & Margery Turner eds., 1993).

232. *Id.* at 162.

233. *Id.* at 169-73.

234. *Id.* at 169-71.

cans are willing to be the first to integrate a white neighborhood.²³⁵ Again, the 1990 NORC survey reflects similar results nationally.²³⁶

Racial bias provides key players in the real estate industry such as landlords, brokers, and lenders with an economic incentive to discriminate. For example, typically, agents who operate in white neighborhoods depend on white clients for business. As such, the agent is likely to cater to the preferences of her clientele in order to protect and promote her reputation within her client base.²³⁷ That reputation may be significantly damaged if an agent introduces African-American or Latino home seekers into white enclaves. Similarly, such an agent's reputation could be damaged among other brokers, potentially reducing the cooperation that is critical in the real estate sales industry. This is a particularly powerful dynamic in a market where increasingly, homes are sold through multiple listing services which rely on cooperation among agents.²³⁸ Given the ease with which housing discrimination can be disguised, strong economic incentives often prevail over anti-discrimination statutes.

For more than forty-five years, "testing" or "auditing" has been used as a reliable measure of discrimination.²³⁹ Through testing, researchers obtain direct comparisons between the treatment received by white housing applicants as compared with the treatment accorded to equally qualified minority applicants.²⁴⁰ Testing on a

235. *Id.* at 171.

236. *Id.*

237. In the Columbia Fair Housing Clinic, clients are often unsure of where to place responsibility for the discrimination they have suffered. Frequently, the clients' attempts to secure housing brings them into contact with a wide range of actors, including employees of the owners, brokers, and sometimes the owners themselves. In investigating these cases as part of the litigation process, there is a great deal of finger-pointing on the part of agents who claim that they were only following the directives of their principals. The application of a strict vicarious liability standard by the courts is, in part, a response to this phenomenon. In the ordinary course, principals are not allowed to hide behind the actions of their agents. SCHWEMM, *supra* note 18, at 12-31 to 12-32. Similarly, agents are not allowed to escape liability by claiming that their actions were taken at the behest of their principals. *Id.* at 12-39; *see, e.g.*, *Janowski Lee & Assoc. v. Cisneros*, 91 F.3d 891, 896-97 (7th Cir. 1996); *Cabrera v. Jakabovitz*, 24 F.3d 372, 385-89 (2nd Cir. 1994), *cert. denied*, 513 U.S. 876 (1994); *Green v. Century 21*, 740 F.2d. 460, 462, 465 (6th Cir. 1984); *Hobson v. George Humphreys, Inc.*, 563 F. Supp. 344, 352 (W.D. Tenn. 1982).

238. *See* YINGER, *supra* note 226, at 180-81.

239. John Yinger, *Testing for Discrimination in Housing and Related Markets*, in A NATIONAL REPORT CARD ON DISCRIMINATION IN AMERICA: THE ROLE OF TESTING 27, 28 (Michael Fix & Margory Austin Turner eds., 1999), available at http://www.urban.org/civil/report_card.pdf (last visited Mar. 15, 2003).

240. *Id.* In a typical fair housing test, equally qualified housing applicants, one white and one African-American, seek the same housing accommodation at closely timed intervals and record the results of their encounters. *Id.*

broad scale in discrete housing markets can reveal the extent to which discrimination occurs within that market. In 1977, the U.S. Department of Housing and Urban Development ("HUD"), funded the Housing Market Practices Survey ("HMPS"), the first national study of housing discrimination against African-Americans.²⁴¹ Through HMPS, 3,264 tests were conducted in forty metropolitan areas revealing evidence of significant discrimination against African-Americans in both the sales and rental markets.²⁴² Moreover, the HMPS report is credited with playing a "major role" in the eventual passage of the 1988 amendments to the FHA.²⁴³

In the years since the HMPS report, an impressive number of additional studies have been performed. In the period between 1977 and 1990, at least seventy-two other testing studies were conducted.²⁴⁴ Evidence of housing discrimination was found in all of these studies.²⁴⁵

In 1989, HUD sponsored a second national testing study, the Housing Discrimination Study ("HDS"). Through the HDS, 3,745 tests were conducted in twenty-five metropolitan areas to track the frequency of discrimination experienced by African-Americans and Latinos in the sales and rental markets in 1989.²⁴⁶ The HDS measured a wide range of discriminatory behavior and found that there was a fifty percent probability that both African-American and Latino applicants would encounter some form of discrimination in both the sales and rental markets.²⁴⁷ The figures indicate that fifty-three percent of African-American renters and fifty-nine percent of African-American home buyers will experience one or more incidents of discrimination while looking for a home.²⁴⁸ Five similar studies conducted in individual cities in the 1990s found that, "the gross measure of discrimination in rental housing is at least fifty percent (and as high as seventy-seven percent) against both Blacks and Hispanics" in some areas.²⁴⁹ In analyzing the HDS report, Professor John Yinger applied a form of index that resulted in a "net measure of the average number of acts of dis-

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.* at 32-33.

247. *Id.* at 34.

248. MARGERY AUSTIN TURNER ET AL., U.S. DEP'T HOUS. & URBAN DEV., HOUSING DISCRIMINATION STUDY: SYNTHESIS 42 (1991).

249. Yinger, *supra* note 239, at 34.

crimination a black or Hispanic customer can expect to encounter during each visit to a housing agent.”²⁵⁰ Using this method, the HDS report demonstrated that African-American and Latino home buyers could expect on average, “to encounter about one act of discrimination each time they visit a real estate broker.”²⁵¹

In sum, the available evidence shows that the frequency of housing discrimination, from the HMPS report in 1977 to more recent studies in the 1990s, has remained constant.²⁵² The inexorable conclusion drawn from the available statistical evidence was stated in *A National Report Card on Discrimination in America: The Role of Testing*, issued by the Urban Institute:

Overall, this research demonstrates that black and Hispanic home seekers continue to encounter discrimination in many aspects of a housing transaction. They are told about fewer available units and must put forth considerably more effort to obtain information and to complete a transaction. These barriers are not absolute, but they impose significant costs on black and Hispanic home seekers relative to comparable whites in the form of higher search costs, poorer housing outcomes, or both.²⁵³

This macro cycle of segregation, ignorance, and persistent discrimination spins off many micro cycles of harm. As discussed earlier, in one such “micro cycle” segregation leads to a lack of contact between whites and African-Americans, which in turn spawns an inability to see the “other” free from assumptions and negative stereotypes.²⁵⁴ This devaluation of the individual permits for some, the rationale that allows for discriminatory treatment and a disregard for the emotional harm that is its natural consequence. Where a class of people are seen as undesirable for association or even inferior, it is likely that they will not be treated with the same

250. *Id.* at 36.

251. *Id.*

252. *Id.* at 34.

253. *Id.* at 36. Note also that there is a growing and compelling body of evidence that indicates widespread discrimination against minorities in mortgage approvals, lender advertising and outreach, pre-loan application procedures and loan terms, as well as in the provision of private mortgage insurance. YINGER, *supra* note 226, at 63-85. This might lead one to assume that the courts are inundated with housing discrimination cases. For a variety of reasons, however, housing discrimination is not litigated at nearly the rate at which it occurs. One important factor is the ability of perpetrators to mask their illegal acts. Many victims of differential treatment never realize that their membership in a protected class has just barred them from securing housing accommodations.

254. See *supra* note 29. For an interesting discussion of the extent to which residential segregation has resulted in a profound lack of contact between African-Americans and whites, see Greenberg, *supra* note 227, at 557-59.

respect accorded to an equal.²⁵⁵ This psycho-social rationale for discriminatory conduct contributes to the persistence of illegal behavior.

B. The Importance of Diversity in the Bench, Bar, and Professional Support Systems: Developing the Context for Racial Empathy

Another micro cycle that is observed is rooted in history and demographics of the legal system. One vestige of this country's history of legalized discrimination in housing, employment, and education can be seen in the demographics of fact-finders: judges and juries. Despite some positive movement towards a more representative bench, the judiciary remains overwhelmingly white.²⁵⁶ For example, the 1991 Report of the New York State Judicial Commission on Minorities found that of the 1,129 judges sitting in the courts of the New York, all but ninety-three are white.²⁵⁷ The report goes on to conclude that, "[F]or nearly three hundred years, New York State has had little or no minority representation on the bench."²⁵⁸

The dissonance between legal standards, the presumed ability of fact-finders to filter out bias and an emerging understanding of human cognition, behavior, and decision-making, lies at the heart of the undervaluation of emotional harm claims.²⁵⁹ While there has been a reluctance to challenge the impartiality of judges on the basis of race, the need to do just that is imperative to ensure the proper functioning and integrity of the legal system.²⁶⁰ Advances in the understanding of the cognitive and behavioral underpinnings of decision-making and a growing body of empirical study on how race can produce differences in perceptions on a wide range of is-

255. See, e.g., Crosby et al., *supra* note 139, at 546; Peggy C. Davis, *Law As Microaggression*, 98 YALE L.J. 1559, 1561-69 (1989).

256. Demographics gathered with respect to the federal judiciary, for example, reveal the following statistics as of July 13, 2000. Of the 792 active judges: "82.7% white (655), 10.7% African-American (85), 5.2% Hispanic (41), 0.9% Asian-American (7), 0.3% Native-American (2), and .1% Arab-American (1)." Alliance for Justice, *Demographic Portrait of the Federal Judiciary* (2000), at <http://web.archive.org/web/20010208193600/http://www.afj.org/jsp/pfjjan.html> (last visited Mar. 15, 2003).

257. 4 REPORT OF THE NEW YORK STATE JUDICIAL COMMISSION ON MINORITIES, LEGAL PROFESSION, NONJUDICIAL OFFICERS, EMPLOYEES AND MINORITY CONTRACTORS 94 (1991). Of the ninety-three "non-white" judges, only seventy-one are African-American. *Id.*

258. *Id.*

259. See *supra* notes 219-225.

260. Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 405 (2000).

sues can foster an ability to approach the issue in a less judgmental fashion.²⁶¹ As one commentator observed:

The existence of a persistent racial divide between the response of African Americans and whites to important social, economic, political, and cultural issues evidences the enduring power of racial constructs. In countless surveys, African Americans and whites reveal sharply different perspectives, particularly in response to issues that explicitly refer to race. For example, blacks and whites disagree about the meaning and power of discrimination. Because many issues not explicitly racial in nature carry a racial sub-text, African Americans and whites also express different views about ostensibly nonracial issues such as increasing aid for social programs, downsizing of the federal government, raising taxes, and giving control of welfare to the states.²⁶²

These differences in perspective often play an active and varied role in valuing emotional harm. Consider that, in New York, compensation for emotional harm may be awarded upon proof of the existence and extent of such harm, and evidence that supports a determination that “a reasonable person of average sensibilities could be fairly expected to suffer mental anguish from the incident.”²⁶³ In bench trials, that can occur in trial courts and in all hearings before administrative agencies, who is the “reasonable person of average sensibilities?” Given the demographics of the judiciary, far more often than not, that “reasonable person” is someone whose sensibilities have not been affected by experiences of discrimination and the trauma that is the norm, by medical standards. This does not make fair valuation impossible, but cannot be seen as enhancing the possibility of a knowledgeable assessment.²⁶⁴

The “reasonable person” standard, in this context, is an attempt to impose an “objective” perspective on what should be a fact-specific evaluation of harm as it is experienced by each plaintiff within the context of that plaintiff’s life.²⁶⁵ Even when “objective” standards are not formally employed, the very nature of the legal doc-

261. *Id.* at 424-31.

262. *Id.* at 424-25. It is, of course, important to disclaim any suggestion that all members of any group share the same opinions. The point, however, is that because of the history and continuing power of racism in the United States, the experiences of whites and African-Americans are often quite different and those experiences can affect perceptions.

263. *Batavia Lodge No. 196 v. N.Y. State Div. of Human Rights*, 350 N.Y.S. 273, 278 (App. Div. 1973), *modified on other grounds*, 316 N.E.2d 318 (N.Y. 1974).

264. Schwemm, *supra* note 22, at 93.

265. SCHWEMM, *supra* note 18, at 25-37 to 25-40; see Heifetz & Heinz, *supra* note 75, at 18-21.

trine that applies to evaluations of emotional harm leaves ample room for judicial miscalculation regarding the proper weight that should be accorded to the evidence. This can occur through a lack of sensitivity, inexperience, bias (unconscious or not), or through a substitution, however subtle, of the judge's reaction to the discriminatory behavior for the actual proof adduced at trial regarding the plaintiff's reaction.²⁶⁶

Generally, judges in bench trials and at administrative agencies, like juries, have enormous discretion in determining the size of damage awards for intangible injuries such as emotional harm.²⁶⁷ As a matter of course, the fact-finder's decision regarding the amount of the award will survive appellate review unless it is clearly erroneous.²⁶⁸

Trial judges have been repeatedly admonished to articulate the bases for the awards they make.²⁶⁹ Adherence to this practice, however, seems more the exception than the rule.²⁷⁰ This, in part, has led to great uncertainty in predicting the valuation of emotional harm and to wide variations in precedent.²⁷¹

266. Ifill, *supra* note 260, at 417. In the words of Professor Ifill:

The intuitive sense that minority judges can bring traditionally excluded perspectives to the process of legal decision-making is consistent with the prominent role race plays in shaping the perspectives and values of blacks and whites. I deliberately speak here of both perspectives and values. Perspectives might be defined as "ways of looking at the world" or the eyes through which blacks "see" and "interpret" events, symbols, or people. Because perception is the lens through which judges make decisions, the inclusion of multiple perspectives in judicial decision-making is a critical focus of diversity. Values are also critical to judicial decision-making. Values are the rules or standards by which a community, based on its perceptions, organizes and assigns worth. Values reflect "an enduring belief that a specific mode of conduct or end-state of existence is personally or socially preferable." Values are the principles which undergird our laws and legal doctrine. Judges interpret law based on their perception of our core societal values. Both perspective and values can strongly influence legal decision-making.

Id.

267. SCHWEMM, *supra* note 18, at 25-43.

268. *Id.*; see FED. R. CIV. P. 52(a).

269. See *N.Y. City Transit Auth. v. State Div. of Human Rights*, 577 N.E.2d 40, 47 (N.Y. 1991); see also Heifetz & Heinz, *supra* note 75, at 7-8 (reminding readers that litigants before HUD have the right, pursuant to the Administrative Procedure Act, to "hear why the judge rendered a particular decision.").

270. See Heifetz & Heinz, *supra* note 75, at 7 (recalling a "history of cases (in district courts) with no apparent nexus between evidence of actual injury and the award of damages to the complainant, and a paucity of published opinions explaining the basis for the awards [in housing discrimination cases]").

271. SCHWEMM, *supra* note 18, at 25-34 to 25-35 ("Predicting the value of an individual case is virtually impossible.").

In addition to assessing the nature of the plaintiff's reaction to discrimination, there are at least two other major areas of judicial review in housing discrimination cases that are susceptible to the same kinds of miscalculations stemming from bias, a lack of applicable life experience, training, or sensitivity. The first involves issues of credibility that are so crucial in the valuation of emotional harm injuries. In the words of Alan W. Heifetz, the Chief Administrative Law Judge ("ALJ") at HUD, "[w]ithout doubt, the most important factor in determining a damage award for intangible injuries is the testimony of the victim."²⁷² Judges and juries are the chief "finders of fact" in our system of justice.²⁷³ Assessments of credibility are at the heart of what judges do to determine what is or is not true, what did or did not happen. Perception is the lens through which judges make decisions.²⁷⁴ Judges face the same challenges as everyone else in our society, when attempting to appropriately invoke their life experience and perspective in making decisions.²⁷⁵ As expressed by Judge Jerome Frank, "[m]uch harm is done by the myth that, merely by putting on a black robe and taking the oath of office as a judge, a man ceases to be human and strips himself of all predilections, becomes a passionless thinking machine."²⁷⁶ Race, in turn, influences perceptions and judges' sense of justice.²⁷⁷ Such racial "cognitive drifts" among judges may affect critical decisions including the credibility of an African-American witness or the worth of an African-American expert, both of which can adversely affect the valuation of emotional harm damages occasioned by African-American victims of housing discrimination.²⁷⁸

The second area of judicial fact interpretation that can greatly influence valuation outcomes involves an assessment of the egregiousness of the defendant's behavior. Professor Schwemm has detailed the enormous importance of a finding that the discriminatory acts were willful and, therefore, more likely to cause more severe emotional harm.²⁷⁹ Questions of intent or willfulness are also within the purview of perceptions that can be affected by racialized

272. Heifetz & Heinz, *supra* note 75, at 19.

273. See FED. R. CIV. P. 52(a).

274. Ifill, *supra* note 260, at 417.

275. *Id.* at 432.

276. *In re J.P. Linahan, Inc.*, 138 F.2d 650, 652-53 (2d Cir. 1943)

277. Ifill, *supra* note 260, at 434.

278. *Id.* at 445; See Davis, *supra* note 255, at 1571.

279. SCHWEMM, *supra* note 18, at 25-37.

experience.²⁸⁰ Indeed, there is support for the belief that in our society, with its deep racial divisions, the interpretation of “narratives,” as may be contained in the testimony of a defendant in a housing discrimination case for example, are suspect. The suspicion stems from the reality that narratives can be adopted or rejected when viewed through the lens of preconceived ideas, even in the face of evidence or logic to the contrary.²⁸¹ The skewed demographics of the judiciary invoke concern that imbalances in perception of the kind outlined above may play a role in the undervaluation of damage awards.

The dissonance between racialized differences in perspective and judicial demographics may find expression in other features of judicial action that dampen the capacity to secure awards that are more in line with the emotional distress that is credibly experienced by many victims of housing discrimination. One such phenomenon is the appearance of an artificial ceiling on damage awards in certain jurisdictions. Professor Schwemm notes the emergence of a \$10,000 per plaintiff upward benchmark in emotional distress awards in the Seventh Circuit that stands in contrast to outcomes in other circuits.²⁸²

Similarly, the Court of Appeals in New York, in an opinion by the Honorable Judith Kaye, who went on to become the current Chief Judge, found it necessary to admonish the Second Department for arbitrarily reducing a \$450,000 award for mental anguish and aggravation in an employment discrimination suit, to \$75,000.²⁸³ In a rare display of disapproval that, by implication, extended beyond the parameters of the case on appeal, the court cautioned the justices serving on the Second Department bench not to routinely substitute their own abstract notions of an upward limit on emotional harm awards for well supported findings of trial courts.²⁸⁴ More specifically, the court reversed a decision by the

280. For a useful introduction to the various critiques of the intent standard, see Ifill, *supra* note 260, at 450 n.214.

281. T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1085 (1991).

282. SCHWEMM, *supra* note 18, at 25-40 to 25-42.

283. *N.Y. City Transit Auth. v. State Div. of Human Rights*, 577 N.E.2d 40, 47 (N.Y. 1991).

284. *Id.* at 217-19. Amici, including the Women's Legal Defense Fund, argued that the New York Supreme Court, Appellate Division, Second Department has a practice of substituting their own judgment for that of the trial judge. *Id.* at 209. A large number of Second Department cases were cited where trial court awards were reduced to a top amount of \$5,000. *Id.* at 218-19. There is little doubt that this practice caught the attention of the Court of Appeals and precipitated reference to the conten-

Second Department that a maximum of \$75,000 would adequately compensate the plaintiff for what the trial ALJ described as, "the most shocking instance of abuse of an employee by an employer."²⁸⁵

Another feature of judicial action that may serve to depress awards can be seen in the different approaches taken by various circuit courts in the application of the "eggshell skull" or "thin skull" doctrine in cases involving psychological trauma. In the ordinary course, tortfeasors, such as the defendants in a housing discrimination matter, "take their victims as they find them."²⁸⁶ This doctrine requires defendants to compensate plaintiffs for unforeseeable psychic injury flowing from preexisting conditions or heightened sensitivity to discrimination.²⁸⁷ As HUD's Chief ALJ expressed the doctrine:

Housing discriminators must take their victims as they find them; that is, damages are measured based on the injuries actually suffered by the victim, not on the injuries that would have been suffered by a reasonable or by an ordinary person. Put otherwise, judges must take into consideration the susceptibility of the victim to injury. This rule can work either to the respondent's financial advantage or disadvantage.²⁸⁸

tions of the amici. *Id.* at 219. The cases submitted to support the claim of a \$5,000 ceiling were: *Empanque Capital Corp. v. White*, 551 N.Y.S.2d 957, 958 (App. Div. 1990); *Grumman Aerospace Corp. v. N.Y. State Div. of Human Rights*, 542 N.Y.S.2d 681, 682 (App. Div. 1989); *Cosmos Forms, Ltd. v. State Div. of Human Rights*, 541 N.Y.S.2d 50, 51 (App. Div. 1989); *Trans World Airlines, Inc. v. N.Y. Executive Dep't*, 537 N.Y.S.2d 868, 869-70 (App. Div. 1989); *Arthur Kessler Realty, Inc. v. N.Y. State Div. of Human Rights*, 524 N.Y.S.2d 732, 733 (App. Div. 1988); *State Univ. Agric. & Technical Coll. at Farmingdale v. State Div. of Human Rights*, 520 N.Y.S.2d 814, 815 (App. Div. 1987); *Wantagh Union Free Sch. Dist. v. N.Y. State Div. of Human Rights*, 505 N.Y.S.2d 713, 715 (App. Div. 1986); *Matter of Anchor Motor Freight, Inc.*, 500 N.Y.S.2d 800, 801 (App. Div. 1986).

285. *Id.* at 210. Of significance is that the Second Department sits in judgment over a disproportionately large portion of New York. The Historical Society of the Courts of the State of New York, *The History of the Court, Appellate Division, Second Department*, 100th Anniversary (1996), at <http://www.courts.state.ny.us/history/ebook/2ddept/pg4.htm> (last visited Mar. 15, 2003). As of 1996, more than one-half of the population of the State resides in the Second Department and approximately forty-two percent of intermediate appellate cases were handled by the court. *Id.* The ten counties within the Second Department are: Kings, Queens, Richmond, Nassau, Suffolk, Westchester, Putnam, Dutchess, Rockland, and Orange Counties. *Id.*

286. JOHN P. RELMAN, *HOUSING DISCRIMINATION PRACTICE MANUAL* 6-12 (2001).

287. *Id.*

288. Heifetz & Heinz, *supra* note 75, at 21-22; In *Davis v. Mansards*, a married couple had been the victim of housing discrimination. 597 F. Supp. 334, 347-48 (N.D. Ind. 1984). The court awarded \$5,000 to the wife who had been, "decimated. . .emotionally," but only \$2,500 to the husband who approached the situation with a "degree of cynicism" and was consequently, "steadied for the blow" even

This rule, which applies to both preexisting physical and psychological conditions, has been followed in the Seventh Circuit.²⁸⁹ In the Second Circuit, however, victims of housing discrimination may not recover for preexisting psychic trauma.²⁹⁰ In a culture where racism is common, the refusal to award harm in proportion to the actual damage inflicted, in effect, insulates discriminators from the proper level of economic exposure for their actions. In so doing, it flies in the face of the stated purpose of fair housing laws.

Coming at the point directly, there is one empirical study that specifically links race to judicial outcomes in discrimination cases. The study, *The Effects of Judges' Decision Making on the U.S. Courts of Appeal 1981-96*, tracked case outcomes in the federal court.²⁹¹ Among its findings are the following:

- (1) black federal judges regardless of political party affiliation decide cases in favor of plaintiffs in race discrimination cases at statistically significantly higher levels than white male and female judges; and that (2) black federal judges are more likely than even white female judges to decide cases in favor of plaintiffs in sex discrimination cases.²⁹²

The data from the study further reveals that an appellate panel of three white Republican judges is likely to find in favor of the plaintiff in a discrimination case only ten percent of the time.²⁹³ The likelihood of drawing an appellate panel with even one African-American judge is only twenty-percent.²⁹⁴ Based on these findings, Professor Crowe, the study's author, concludes that if "the number of blacks and whites on Appellate Court[s] reflected their proportion in the nation,' . . . it would 'make a difference in how race discrimination cases [would] . . . be decided.'"²⁹⁵

The study appears to directly suggest that the lack of full racial diversity on federal appellate courts both determines the immediate outcome of discrimination cases and, in so doing, has played a

"though he suffered through his wife's depression while sustaining his own reopened wounds." *Id.*

289. See, e.g., *Avitia v. Metro. Club of Chi., Inc.*, 49 F.3d 1219, 1228 (7th Cir. 1995); *Brackett v. Peters*, 11 F.3d 78, 81 (7th Cir. 1993), *cert. denied*, 515 U.S. 1072 (1994); *Williamson v. Handy Button Mach. Co.*, 817 F.2d 1290, 1294 (7th Cir. 1987).

290. *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 908 (2d Cir. 1993).

291. Ifill, *supra* note 260, at 454 n.234.

292. *Id.* at 454.

293. *Id.*

294. *Id.*

295. *Id.* (quoting Nancy Crowe, *The Effects of Judges' Sex and Race on Decision Making on the U.S. Courts of Appeal, 1981-96* (1999) (unpublished Ph.D. dissertation, University of Chicago) (on file with the author)).

role in the development of federal anti-discrimination law.²⁹⁶ According to Professor Ifill, “[t]he empirical work of Professor Crowe supports the weight of anecdotal evidence which suggests that African American and white judges see racial bias differently. At the very least, Professor Crowe’s work demonstrates the potential importance of judicial diversity to affect judicial case outcomes.”²⁹⁷

As is the case with the judiciary, the juries which often sit in judgment on housing discrimination cases are composed primarily of whites.²⁹⁸ Here again the situation in New York is instructive. The *Report of the New York State Judicial Commission on Minorities* reveals that, “[m]inorities are significantly underrepresented on many juries in the court system.”²⁹⁹ The report further finds that:

while displays of blatant racism are not common in today’s courtrooms, jurors’ racist attitudes, whether or not they are actually uttered aloud, frequently determine the outcome of cases involving minority defendants. Studies also show that hidden racial prejudices can distort a juror’s perception of the evidence and events at trial.³⁰⁰

Certainly, the presence of an all or predominantly white jury does not preclude fairness or an informed evaluation of emotional harm. The lack of racial diversity in juries, however, results in a situation whereby those responsible for valuing the trauma experienced by victims of discrimination are often not equipped with a knowledge base, gained through personal experience or sustained relationships with those outside the dominant culture, sufficient to accurately assess plaintiffs’ claims.³⁰¹

296. *Id.*

297. *Id.* at 454-55.

298. See, e.g., THEODORE EISENBERG & MARTIN T. WELLS, TRIAL OUTCOMES AND DEMOGRAPHICS: IS THERE A BRONX EFFECT? 12 (2002) (indicating eleven percent of federal juries and twelve percent of state juries are comprised of African-Americans), available at www.utexas.edu/law/academics/centers/clcjm/civiljustice/Eisenberg.pdf (last visited Mar. 15, 2003). Note that the statistics are based on a sample, albeit a large sample, of juries. *Id.* at 1 n.1.

299. 2 REPORT OF THE NEW YORK STATE COMMISSION ON MINORITIES, THE PUBLIC AND THE COURTS 58 (1991).

300. *Id.* at 57.

301. See *Ragin v. N.Y. Times Co.*, 923 F.2d 995, 1005 (2d Cir. 1991) (noting that the process whereby awards for emotional harm are calculated requires “wholly speculative judgments as to credibility.”). Speculation of this type necessarily implicates our internal propensity to rely on stereotypes in forming factual conclusions. See Davis, *supra* note 255, at 1566-67. There is strong speculation among trial lawyers concerning the relationship between juror demographics and trial outcomes. See EISENBERG & WELLS, *supra* note 298, at 2. Moreover, a review of housing discrimination cases involving claims of emotional harm reveals anecdotal evidence indicating that many of the higher awards occur in jurisdictions with higher concentrations of people of

History and demographics also contribute to a cycle that makes it difficult for those who suffer from the emotional harm caused by housing discrimination to receive assistance and support from the two professions that are in the best position to provide relief: the legal and medical professions. Here again, the racism that has constrained the life choices of people of color manifests itself in the demographics of lawyers and doctors.

A useful landmark for a discussion about the under-representation of minorities in the both the legal and medical professions generally is the demographics of the United States population. As a point of reference, the minority group population, according to the 1980 census, was twenty percent.³⁰² By 2000, whites comprised only 69.1 percent of the population.³⁰³ This trend towards greater

color. One such example can be found by comparing the judges' responses to emotional harm claims in *Portee* and *Broome*. See discussion *supra* note 97. There are, however, no known surveys that claim to correlate damage awards for emotional harm with the demographics of the fact finders. Indeed, empirical studies seeking a correlation between trial outcomes generally and demographics are rare. The most recent and statistically comprehensive such study, known to the Authors, *Trial Outcomes and Demographics: Is there a Bronx Effect?*, concludes that in federal jury trials, "We do find a significant correlation between larger black population percents and the likelihood of a plaintiff trial win in urban job discrimination, products liability, and torts cases." EISENBERG & WELLS, *supra* note 298, at 1. At the same time, the study concludes that, "[i]n federal court trials, we find no robust evidence that award levels in cases won by plaintiffs correlate with population demographics in the expected direction." *Id.* The study concedes that:

there are limits to what the available data can reveal. The data do not include the makeup of juries in individual cases. Therefore, evidence about demographic influences on juror behavior is indirect. . . . Nor can the data test perceptions based on the interaction between plaintiff and defendant characteristics. For example, these data cannot directly test whether white jurors are hostile to black plaintiffs, and vice versa, because the data do not include the parties' race.

Id. at 9.

302. KENT D. LOLLIS & ROBERT D. CARR, LAW SCH. ADMISSIONS COUNCIL, MINORITY DATABOOK 1 (2002).

303. U.S. Census Bureau, Quick Table, DP-1. Profile of General Demographic Characteristics: 2000 (2000), at http://factfinder.census.gov/servlet/QTTable?ds_name=DEC_2000_SF1_U&geo_id=01000US&qr_name=DEC_2000_SF1_U_DP1 (last visited Mar. 15, 2003). In 2000, there were 194,552,774 people who were identified as "white alone" and this figure represented 69.1 percent of the total population. *Id.* The manner in which racial categories are defined by the Census Bureau is interesting. According to the Bureau:

The data on race were derived from answers to the question on race that was asked of all people. The concept of race, as used by the Census Bureau, reflects self-identification by people according to the race or races with which they most closely identify. These categories are sociopolitical constructs and should not be interpreted as being scientific or anthropological in nature. Furthermore, the race categories include both racial and national-origin groups.

diversity will significantly increase in the coming years.³⁰⁴ Credible estimates project that whites will no longer be in the majority by mid-century.³⁰⁵ It is against this backdrop, that the demographics of lawyers and doctors should be considered.

By early 1988, the population of lawyers in the U.S. had grown to nearly 750,000.³⁰⁶ At that time, when African-Americans, Latinos, Native Americans, and Asian Americans accounted for nearly twenty-five percent of the United States population, that same group accounted for only eight percent of this country's attorneys.³⁰⁷ Current statistics indicate slightly more diversity within the legal profession, but also some disturbing omens of retrenchment and continued under-representation. The American Bar Association's Commission on Racial and Ethnic Diversity in the Profession³⁰⁸ concludes that as of 2000, "minority representation in the legal profession is significantly lower than in most other professions."³⁰⁹ The report adds that, "minority entry into the profession

U.S. Census Bureau, Census Data Information, Subject Characteristic, at http://factfinder.census.gov/servlet/MetadataBrowserServlet?type=subject&id=RACESF1&dsspnName=DEC_2000_SF1&back=update&_lang=EN (last visited Mar. 15, 2003). The Census Bureau used "Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity," a Federal Register Notice, published by the Office of Management and Budget. *Id.* "White" is defined as, "A person having origins in any of the original peoples of Europe, the Middle East, or North Africa." *Id.* "It includes people who indicate their race as 'White' or report entries such as Irish, German, Italian, Lebanese, Near Easterner, Arab, or Polish." *Id.*

304. LOLLIS & CARR, *supra* note 302, at 1.

305. U.S. Census Bureau, Projections of the Resident Population by Race, Hispanic Origin, and Nativity: Middle Series, 2050 to 2070 (2000), at <http://www.census.gov/population/projections/nation/summary/np-t5-g.txt> (last visited Mar. 15, 2003). The Census Bureau provides population projections across many variants. For our purposes, these projections are done based on a lowest, middle, and highest series, with the "lowest" representing the minimum projection that can be expected using their methodology. Using the Bureau's "Middle Series" projections, the "White, Non-Hispanic" population will fall below fifty percent, to 49.6 percent by July 1, 2060. *Id.* The ABA's Commission on Racial and Ethnic Diversity in the Profession predicts that the United States population will be "almost 60 percent 'minority' by 2050." COMM'N ON RACIAL & ETHNIC DIVERSITY IN THE PROFESSION, AM. BAR ASS'N, EXECUTIVE SUMMARY, MILES TO GO: THE PROGRESS OF MINORITIES IN THE LEGAL PROFESSION, at <http://www.abanet.org/minorities/publications/milessummary.html> (last visited Mar. 15, 2003).

306. GEOFFREY C. HAZZARD, JR. & DEBORAH L. RHODE, *THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION*, 48-55 (3d ed. 1994).

307. *Id.* at 68.

308. This body was known as the Commission on Opportunities for Minorities in the Profession.

309. COMM'N ON RACIAL & ETHNIC DIVERSITY IN THE PROFESSION, *supra* note 305.

Combined African American and Hispanic representation among lawyers was seven percent in 1998, compared to 14.3 percent among accountants, 9.7

has slowed considerably since 1995.”³¹⁰ Moreover, “in 1999, the total number of minority law graduates in the United States dropped for the first time since 1985.”³¹¹

It should not be surprising that it can be difficult for lawyers who have not experienced the pain caused by discrimination to understand, appreciate, value, and pursue substantial emotional harm awards.³¹² This is particularly important in that:

Attorneys . . . are frequently the first, and sometimes the only persons to whom the victim pours out the full story of his or her experience. The attorney’s . . . verbal and non-verbal responses during the interviews with the victim can either aggravate or alleviate some of the pain and anguish suffered by the victim.³¹³

Many advocates who seek to properly present a record in support of a meaningful award of emotional harm damages lack the requisite personal and professional experience.³¹⁴ The few scholars and jurists who have written on this subject commonly stress the importance of creating an extensive factual record regarding the manifestations and extent of the harm suffered.³¹⁵ This requires the advocate to fully appreciate the varied and often subtle symptoms of discrimination-based trauma that the client might manifest and to have the facility to both elicit and present what is often very personal information in a caring and persuasive manner. Experience and training are typically required, regardless of the personal characteristics of the advocate.³¹⁶ Differences in race, age, and

percent among physicians, 9.4 percent among college and university teachers, and 7.9 percent among engineers. The only professions with lower levels of minority representation were dentists (4.8 percent) and natural scientists (6.9 percent).

Id.

310. *Id.*

311. *Id.*

312. See Davis, *supra* note 255, at 1561-64; Lawrence, *supra* note 115, at 519, 525-26.

313. Michael P. Seng et al., *Counseling a Victim of Racial Discrimination in a Fair Housing Case*, 26 J. MARSHALL L. REV. 53, 54-55 (1992).

314. *Id.*

315. Heifetz & Heinz, *supra* note 75, at 19-21.

316. *Id.* The authors nicely articulate the challenge as follows:

Most attorneys and advocates who counsel the victims of housing discrimination are committed to the cause of fair housing and are sensitive to their client’s injuries. Nonetheless, they may fail to pick up on the real hurt and trauma the client experiences during the interview. Because of the necessity to channel the client’s complaint into the forms specified in the fair housing laws, the attorney or advocate may miss developing some of the unique injuries suffered by the victim. This failure may seriously affect the outcome of the complaint and it may further scar the victim.

gender can sometimes inhibit a candid exchange of information between attorney and client. Beyond that lies the propensity for attorneys to focus only on “objective” facts, or presume an understanding by the tribunal of the inherent pain associated with discrimination.³¹⁷

In the medical profession, the demographics reveal even less diversity. The best available statistics from the American Medical Association indicate that in 2001, there were 836,156 physicians in the United States.³¹⁸ Of that total, only 2.5 percent are African-American.³¹⁹ The American Psychiatric Association, in its *Position Statement on Diversity*, acknowledged that, “despite efforts to increase cultural diversity among psychiatrists, data from the AAMC and other sources indicate the continued serious under-representation of certain ethnic minority groups among U.S. medical students, medical school facilities and departments of psychiatry and practicing clinicians.”³²⁰ As this Article shall discuss below, these discouraging demographics, combined with inadequate training in the housing discrimination context make it difficult to find psychiatric professionals who have the training and expertise necessary to recognize the wide range of psychological and physiological symptoms associated with the emotional harm that flow from housing discrimination. A review of how we became aware of this problem is illustrative.

When the Fair Housing Clinic began operation in 1989, most of the cases were lodged at the New York City Commission on Human Rights (“the Commission”). At that time, the Commission was the place where many, if not most, New Yorkers went to pur-

Id. at 55.

317. Seng et al., *supra* note 313, at 55.

318. AM. MEDICAL ASS’N, TOTAL PHYSICIANS BY RACE/ETHNICITY—2001 (2001), at <http://www.ama-assn.org/ama/pub/article/168-187.html> (last visited Mar. 15, 2003).

319. *Id.* Note, however, that the 2001 year-end statistics gathered by the AMA contained race/ethnicity data for about three-fourths of all physicians in the United States. *Id.* The AMA does not, at this time, know the race/ethnicity of thirty-one percent of the physicians in the United States despite efforts to obtain better statistics. *Id.* The AMA estimates that this leads to some underreporting in the number of “minority” categories. *Id.*

320. See Am. Psychiatric Ass’n, *Position Statement on Diversity* (Sept. 12, 1998), at http://www.psych.org/pract_of_psych/diversity_98.cfm (last visited Mar. 15, 2003). Indeed, the “Position Statement” went on to note disparities in the treatment of minority patients indicating that, “[s]ome ethnic minority clinicians have been found to treat ethnic minority and socioeconomically impoverished population.” *Id.*

sue discrimination cases on a pro se basis.³²¹ The Commission awards for emotional harm in housing discrimination cases were quite modest.³²² Cases lodged at the Commission were tried by a small cadre of administrative law judges. We thought that if we could influence that small group of judges by providing expert testimony on issues related to emotional harm, then we could better represent our clients, provide a service to the Commission, and benefit those pro se complainants that we could not directly assist.

We set out to identify a group of psychiatrists who would serve, for compensation, as experts on behalf of our clients. Our students scoured the psychological literature in an attempt to discover the names of leaders in what we naively imagined was a "field" dedicated to the study of race-based trauma. In so doing, we discovered a few surprising phenomena. First, there is very little scholarly writing on the race-based harm suffered by victims of housing discrimination.³²³ Second, there are very few experts on the topic and a dearth of empirical research in this area.³²⁴ Narrowing the search became less of a problem than finding professionals with adequate training or interest in the traumatic effects of housing discrimination. In the end, only a few psychiatrists who

321. Michael H. Schill, *Local Enforcement of Laws Prohibiting Discrimination in Housing: The New York City Human Rights Commission*, 23 FORDHAM URB. L.J. 991, 1020 (1996).

322. See, e.g., *Holley v. Koscielna*, Recommended Decision and Order, Amended Complaint No. FN36020190DN at 17, New York City Commission of Human Rights (1991) (awarding \$2,000 to each complainant).

In instances where mental anguish has been sufficiently demonstrated by credible evidence, this Commission will award compensation in the form of a monetary award. See *Tindull v. Ko*, Rec. Decision and Order, NYCCHR Compl. No. FH304082489-DN (February 25, 1991), *aff'd*, Decision and Order (June 25, 1991) (\$1,000 mental anguish award); *Carrera v. Pi*, Rec. Decision and Order NYCCHR Compl. No. FN264092288-DN (February 25, 1991), *aff'd* Decision and Order (June 24, 1991) (\$1,000 mental anguish).

Id. at 14.

323. See *Broome v. Biondi*, 17 F. Supp. 2d 211, 225 (S.D.N.Y. 1997) ("Relatively little in-depth research exists concerning the personal costs of discrimination and racial exclusion."). Valuable general references have been made by Professor Schwemm in several of his writings. See, e.g., Kentucky Commission on Human Rights, *supra* note 56, at 76-79; Schwemm, *supra* note 22, at 91-93. Most of these discussions concern emotional harm generally and do not focus on particular aspects of the issue that might be unique to the experience of people of color. *Id.* at 93-94.

324. See, e.g., David R. Williams et al., *Race, Stress, and Physical Health: The Role of Group Identity*, in SELF, SOCIAL IDENTITY, AND PHYSICAL HEALTH: INTERDISCIPLINARY EXPLORATIONS 71, 94-96 (Richard J. Contrada & Richard D. Ashmore eds., 1999) (noting the dearth of research on the impact of discrimination on the health of African-Americans).

had acquired expertise in treating victims of discrimination were located.

Ultimately, we began working with Dr. Hugh F. Butts, a prominent psychiatrist with over thirty years experience in treating victims of discrimination.³²⁵ Through our work with Dr. Butts, we learned that there is no formal training in medical school that would introduce medical students to an understanding of race-based trauma.³²⁶ Indeed, the Diagnostic and Statistical Manual of

325. After graduation from Meharry Medical College in 1953, Dr. Butts did an internship and then a Psychiatric residency at the Bronx Veteran's Administration Hospital. He completed his psychoanalytic training at the Columbia University Center for Psychoanalytic training and research in 1961, and was appointed a Supervising and training Psychoanalyst in 1967. Concurrently, he was appointed an Assistant Professor of Psychiatry at the Columbia University College of Physicians and Surgeons. Between 1962 and 1969 he was the Chief of the Psychiatric Inpatient service and Associate Director of Psychiatry at Harlem Hospital Center. From 1974 to 1979 he was the Director of Bronx State Hospital with a one-year interruption (1975 to 1976) to serve as the First Deputy Commissioner of the New York State Department of Mental Hygiene. From 1974 to 1981 he was a full Professor of Psychiatry at the Albert Einstein College of Medicine, and from 1982 to 1986 has been Visiting Professor of Psychiatry at Meharry Medical College, Nashville, Tennessee.

BUTTS, *supra* note 25.

326. See *States Begin to Mandate Standards For Culturally Competent Services*, PSYCHIATRIC NEWS, Jul. 7, 2000, available at <http://www.psych.org/pnews/00-07-07/states.html> (last visited Mar. 15, 2003); see also ELENA COHEN & TAWARA D. GOODE, NATIONAL CTR. FOR CULTURAL COMPETENCE, POLICY BRIEF 1, RATIONALE FOR CULTURAL COMPETENCE IN PRIMARY HEALTH CARE (1999), available at <http://www.georgetown.edu/research/gucdc/nccc/nccc6.html> (last visited Mar. 15, 2003). Among the findings are the following:

Nationally, health care organizations and programs are struggling with the challenges and opportunities to respond effectively to the needs of individuals and families from racially, ethnically, culturally and linguistically diverse groups. The incorporation of culturally competent approaches within primary health care systems remains a great challenge for many states and communities. Despite similarities, fundamental differences among people arise from nationality, ethnicity and culture, as well as from family background and individual experience. These differences affect the health beliefs and behaviors of both patients and providers have of each other. The delivery of high-quality primary health care that is accessible, effective and cost efficient requires health care practitioners to have a deeper understanding of the socio-cultural background of patients, their families and the environments in which they live. Culturally competent primary health services facilitate clinical encounters with more favorable outcomes, enhance the potential for a more rewarding interpersonal experience and increase the satisfaction the individual receiving health care services. Critical factors in the provision of culturally competent health care services include understanding of the:

- beliefs, values, traditions and practices of a culture;
- culturally-defined, health-related needs of individuals, families and communities;

Mental Disorders ("DSM-IV"), which catalogs the variety of mental disorders, and which is the most widely used measure of both the typology and severity of psychological injury, does not contain any description of racism, prejudice, discrimination, or any discussion of the impact that those forces might have on the human psyche.³²⁷

When one considers the extent to which racism has a strong and continuing influence on the daily lives of so many, it is remarkable that the medical professionals who specialize in healing the human psyche often lack the training and personal experience necessary for proper diagnosis and treatment.³²⁸ Dr. Butts, has described the prescription for this diversity deficit as follows:

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- culturally-based belief systems of the etiology of illness and disease and those related to health and healing; and
 - attitudes toward seeking help from health care providers.

In making a diagnosis, health care providers must understand the beliefs that shape a person's approach to health and illness. Knowledge of customs and healing traditions are indispensable to the design of treatment and interventions. Health care services must be received and accepted to be successful. Increasingly, cultural knowledge and understanding are important to personnel responsible for quality assurance programs. In addition, those who design evaluation methodologies for continual program improvement must address hard questions about the relevance of health care interventions. Cultural competence will have to be inextricably linked to the definition of specific health outcomes and to an ongoing system of accountability that is committed to reducing the current health disparities among racial, ethnic and cultural populations.

Id.; see, e.g., James H. Carter, *Racism's Impact on Mental Health*, 86 J. NAT'L MEDICAL ASS'N 543, 544-46 (1994). The author points out that as recently as 1969, the American Psychiatric Association ("APA") discriminated against its African-American members. *Id.* at 544-45. In 1972, the APA acknowledged that the racial attitudes of APA members would have to change in order for its members to adequately treat non-white patients. *Id.* at 545. By 1978, the APA recognized that culture could be a critical element in diagnosing and treating mental disorders, and that "psychiatric literature was replete with misconceptions, inaccuracies, and stereotypes of African-American behavior." *Id.* Despite this resolution from the Task Force, however, resistance by many white psychiatrists continued and misdiagnosis and mistreatment continue to be issues of concern. *Id.* at 545-46; see Maluso, *supra* note 29, at 56 (citing studies that found that African-Americans were less likely to be seen by psychologists or psychiatrists and more likely than whites to be seen by para-professionals). Studies also found that "Blacks were hospitalized for fewer days than Whites, had fewer inpatient privileges than Whites, were less likely to receive occupational and recreational therapy than Whites, were restrained and secluded significantly more often than were Whites, and were medicated twice as many days as were Whites." *Id.*

327. See AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-IV (4th ed. 1994).

328. Hugh F. Butts, *Some Expert Witnesses Are Blatantly Biased*, MEDICAL HERALD, Oct. 1993, at 17.

[c]omprehensive, adequate psychiatric training should include: courses in ethnicity, culture, and race; opportunities for conducting short- and long-term psychotherapy with ethnically or racially diverse patients; and opportunities for short- and long-term psychotherapy supervision with ethnically or racially diverse supervisors. Implicit in these training experiences is the view that cultural factors influence psychopathology, and knowledge of those factors is vital to the ability to offer sensitive, comprehensive, psychiatric care.³²⁹

This is particularly important now, given the demographic trends that point towards growing cultural diversity within the United States population.³³⁰

This paucity of experts and training can lead to serious repercussions. Frequently, victims of discrimination, in an effort to maintain some degree of social effectiveness, attempt to deny the impact of the discrimination.³³¹ As a result, some people who might otherwise benefit from consultation with a mental health professional will not seek help.³³² Those who try to find medical attention face the prospect of treatment by someone without the personal experience or training necessary to provide proper diagnosis and treatment.³³³ This fundamental lack of support from the medical profession can have an impact, not only on the quality of direct service provided to patients, but also on the ability of legal professionals to fully understand and present a client's case.

D. The Continued Slow Recognition of Emotional Harm

The final cycle is one in which the under-valuation of emotional harm by advocates, fact-finders, medical professionals, and sometimes the victims themselves, leads to inappropriately small awards, diminished client satisfaction, a dearth of counsel who are prepared to be retained under economic terms that most victims

329. *Id.*

330. The American Psychiatric Association has recognized this problem. In its "Policy Statement on Diversity," the APA announced support for "the development of cultural diversity among its membership and within the field of psychiatry (including in undergraduate and graduate medical education, in faculty development, in research, in psychiatric administration, and in clinical practice) in order to prepare psychiatrists to better serve a diverse U.S. Population." AM. PSYCHIATRIC ASS'N, *supra* note 320.

331. ABRAM KARDINER & LIONEL OVESEY, *THE MARK OF OPPRESSION: EXPLORATIONS IN THE PERSONALITY OF THE AMERICAN NEGRO* 302-03 (1951); see ELLIS COSE, *THE RAGE OF A PRIVILEGED CLASS* 32-36 (1993).

332. Davis, *supra* note 255, at 1565-68; see Heinrich, *supra* note 35, at 51.

333. Heinrich, *supra* note 35, at 51-52.

are in a position to offer, and poorer remedial processes.³³⁴ This, in turn, makes it less likely that substantial awards will occur at a sufficiently frequent rate and contributes, to the ineffectiveness of anti-housing discrimination laws.

Despite this, there is one reason that clients repeatedly cite as the motivation for seeking legal redress for housing discrimination. That motivating factor is emotional harm. Experience shows that the upset and outrage that is the natural result of being denied a basic human need, shelter, is the single most potent motivation to litigate. In case after case, clients speak with passion about the hurt that they have endured, their need to force those who caused them pain to take responsibility for breaking the law, and their desire to do what can be done to prevent the repetition of discrimination.³³⁵

It would be naive to assert that housing discrimination will vanish in the face of consistently high damage awards. Conversely, it would be unrealistic and unduly cynical to suggest that the prospect of significant compensation would have no effect on the willingness of victims to pursue relief or that the specter of a large judgment would not have an impact on some number of potential perpetrators.³³⁶ In any event, it is certain that high awards have a direct impact on the immediate defendants, counsel, and plaintiffs involved in housing discrimination litigation.

Moreover, the power of precedent can be significant in its effect on subsequent awards. It is difficult to read an opinion in a case awarding emotional harm damages that does not rely on or cite to

334. There are very few providers of free legal services to victims of housing discrimination. Housing discrimination litigation is typically a very costly endeavor when done with the assistance of counsel who are paid at an hourly rate. It is rare for private attorneys to undertake representation of a plaintiff in a housing discrimination dispute on a contingency fee basis. This reflects, in part, a perception within the private bar that housing discrimination cases rarely result in the caliber of recovery that would economically justify the investment in time and effort that is required to properly pursue such cases. As shown earlier, mental suffering is frequently the most significant item of damage in human rights law cases. See *N.Y. City Transit Auth. v. State Div. of Human Rights*, 573 N.E.2d 40, 43 (N.Y. 1991). Therefore, undervaluation can significantly affect the extent to which housing discrimination cases are litigated.

335. There can be other motivations for litigating cases of this type. For example, some clients continue to want the housing that they were denied. To the extent that the desire to recover money or "get rich quick" is the primary motivation, it is unlikely to sustain the type of effort and time necessary to see litigation of this type through to completion, much less collection. This is particularly true where the available public information reflects a paucity of significant financial recoveries.

336. See Kale Williams, *Foreword: Maximizing Damages in a Fair Housing Case*, 26 J. MARSHALL L. REV. 1, 1 (1992).

the range of awards previously made by other courts.³³⁷ Though the resort to precedent in arriving at or evaluating suitable awards can be troubling, there can be little doubt that this practice is, and will continue to be, commonplace. As a general rule, awards in other cases should be viewed by the fact finder as instructive, to be used as a guide, but not binding.³³⁸ The Second Circuit, in *Martell v. Boardwalk Enterprises Inc.*,³³⁹ observed that there are, "difficulties inherent in comparing one personal injury award to another because of the differentiating facts in each case limit the precedential value of a court's treatment of awards in other apparently similar cases."³⁴⁰ This is yet another reason why it is so important for the impact of emotional harm to be fully articulated and properly evaluated in each case.

E. Breaking the Cycle

In the early days of the Columbia Law School Fair Housing Clinic, we began to experience some of the same barriers that we would later learn were common to veteran housing discrimination litigators.³⁴¹ In our efforts to secure our clients' goals, we spent the majority of our energies attempting to establish liability. We soon learned, that it was just as important to spend at least as much time preparing our case on damages if we were ultimately to secure adequate remedies for clients.

Over time, experience has shown that measures can be taken in the pursuit a meaningful damage award. These measures should, in the normal course, lead to a trial record sufficient to support higher awards. Further, and perhaps even more importantly, we have found that the provision of competent and caring legal services is itself a significant part of the healing process for many clients. In short, skillful, thorough, sensitive advocacy can constitute relief. To the extent that an attorney can assist the client in properly presenting an important and personal grievance, that attorney can validate the client's experience, promote the societal goals ex-

337. See, e.g., *Broome v. Biondi*, 17 F. Supp. 2d 211, 216 (S.D.N.Y. 1997); *N.Y. City Transit Auth.*, 577 N.E.2d at 45-46.

338. *Martell v. Boardwalk Enter. Inc.*, 748 F.2d 740, 750 (2d Cir. 1984); cf. *Senko v. Fonda*, 384 N.Y.S.2d 849, 851 (App. Div. 1976) (noting that prior awards "may guide and enlighten the court[s]").

339. *Martell*, 748 F.2d at 750.

340. *Id.*

341. For an interesting discussion of the early efforts to obtain meaningful awards of emotional harm, see 1 KENTUCKY COMM'N ON HUMAN RIGHTS, *supra* note 56, at 23-241.

pressed in the statutes, and assist the client in bringing some closure to a painful and psychologically destructive episode.

Presenting full and accurate information on the issue of emotional harm to the court is a first step in breaking the cycles of ignorance and segregation and making the victims of housing discrimination whole. As a way of concretizing and illustrating the more theoretical aspects of this Article, providing practical assistance to civil rights advocates and their clients, and applying what we have learned about emotional injuries, we offer our "Emotional Harm Checklist."

INTRODUCTION TO USING THE CHECKLIST

Interviewing a client about feelings, particularly with regard to housing discrimination, can be difficult. Feelings are often hard to discuss with friends, much less strangers. In addition, many clients feel the need to deny, to themselves and others, the harm suffered.

It is important to give thought to the process of interviewing on this topic as well as to the content of such interviews. Much can be written about how to encourage the discussion of emotional harm. There are no universal solutions. For now, however, here are a few basic suggestions. First, explain why you are asking such personal questions. Illustrate how the inquiry is connected to achieving the client's stated goals. Second, begin with open-ended questions such as, "how did you feel at the time of the incident?" You should make it possible for the client to speak fully and in her own words. This is important because there is a fine line between conducting a thorough interview and putting words into the client's mouth. Open questions are also good conversation starters. Once the conversation has begun, you can move to the more narrow questions suggested in the Checklist. The Checklist may also be useful in the event that the client is not responding to your open-ended questions.

Differences in race, age, and gender between attorney and client can inhibit the exchange of information. Generally, such differences can be overcome by demonstrating a receptivity and sensitivity to information of this type. Victims of housing discrimination frequently experience severe, confusing, and disquieting reactions. Lawyers can short-circuit full expression by indicating discomfort or skepticism regarding a client's response to the discriminatory event. Many clients look for signs (verbal and non-verbal) that it is okay to talk candidly about such personal, emotionally charged issues.

Tell the client how you plan to proceed with the inquiry, explaining that no detail or sentiment is unimportant or unacceptable. The structure through which facts are gathered can affect the quality and quantity of the information revealed by the client.

Consider proceeding chronologically. For example, ask the client to discuss why she was looking for another place to live or why she chose the dwelling in question. Then move through the time of the discriminatory incident, and to feelings and events thereafter. At each point, ask the client to tell you as much as possible about she felt.

It is also useful to elicit comparisons between the way the client felt, reacted, or thought before the incident regarding the topics listed below, and how she felt at the time of the illegal conduct, one week later, a month later, or more. Feelings and reactions that occur in response to discrimination change over time—sometimes for the better, sometimes for worse. Indeed, finding out from your client what it will take to recover fully, often sheds light on the magnitude and lasting impact of the harm suffered.

Once there is a process for interviewing the client, the attorney will want to conduct a thorough inquiry. The checklist that follows is derived from cases, statutes, articles, expert testimony, and experience. It is included to facilitate a full inquiry and ultimately an adequate recovery. Certainly, no two people experience incidents of this type in the same way. Nevertheless, there is a remarkable similarity in the scope and extent of reactions to housing discrimination. Those similarities are reflected in the checklist that appears below.

THE EMOTIONAL HARM CHECKLIST

- 1) Background:
 - a) Where are you from?
 - b) Where are you currently living?
 - i) How long have you lived in this area?
 - ii) What is your age?
 - iii) What is your occupation?
 - c) What are your interests?
 - d) How often have you taken primary responsibility for finding housing?
 - e) Were/are there other members of your household who were/are depending on you to find housing?
- 2) Have you ever been involved in a housing discrimination lawsuit before?

- 3) Have you ever been involved in any litigation before?
- 4) Have you experienced prior incidents of discrimination?
 - a) If yes, at a later point in the interview, after the client has fully described her/his reaction to the current discrimination, ask whether the client's reaction to the current discrimination is different from reactions to prior acts of discrimination. If so, to what does the client attribute the differences in reaction?
- 5) How would you describe your identity (with which protected class(es) does the client identify)?
- 6) Is the client's membership in the protected class(es) with which she identifies apparent to you upon observation? If not, ask the client how she believes the discriminator knew of the client's membership in the protected class(es).
- 7) The housing search:
 - a) How long had you been searching for housing before this incident?
 - b) Why were you looking for housing?
 - c) What were you looking for in your new home (more room, a home in a particular neighborhood, proximity to schools, work, recreation, relatives/friends)? What was your price range? What features or amenities did you hope to find?
 - d) What symbolic importance, if any, did this new home hold for you? (Was this the first time you were "on your own"? Was the move something you had been saving for? Was it to be a symbol of independence or financial achievement? Was it the reward for hard work or "playing by the rules"? Was it your small piece of the "American dream"?)
- 8) The "subject premises" (i.e., the dwelling that is the subject of the present controversy) ("SP"):
 - a) Fully describe the SP, (if you were not allowed to see the SP, describe the ad that attracted you to the SP). If the client became interested in the SP as a result of an ad, get a copy of the ad and find out how long the ad ran.
 - b) What (in detail) attracted you to the SP?
 - c) What plans, if any, had you made for moving in, renovating, etc., (how emotionally invested were you)?
 - d) How far along in the acquisition process had you gotten before being rejected?

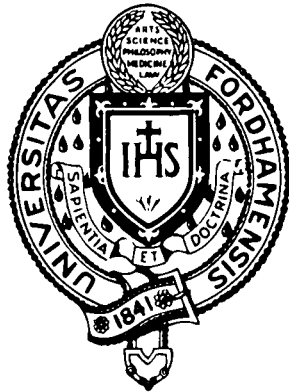
- e) What actions, if any, had you taken in reliance, or in the belief that you would be moving into a new home?
(These can range from telling family and friends that you were moving, to leaving your prior dwelling or, in some cases, actually moving into the SP.)
- 9) The discriminatory event:
 - a) In complete detail, chronologically describe what happened (i.e., the sequence of events that constitutes the violations of law). Let the client determine where the chronology begins and ends. At each significant event, stop and ask the client what she was thinking/feeling. You might consider audio/video taping the interview (if the client is amenable and if you think it won't curtail the information flow) as a way of capturing all of the communication from the client.
 - b) Did anyone witness any portion of these events?
 - i) Who (name, address, phone/fax etc.)?
 - c) What portion of the events did she witness?
 - d) What aspects, if any, of your reaction to the discriminatory events did she witness?
 - e) Is the witness willing to be of assistance?
- 10) Aggravating circumstances:
 - a) Was abusive language used? (get as near a precise quotation as possible)
 - b) Was this a "public" humiliation in any sense? Where did the discriminatory act(s) take place? Were family members, friends or associates present?
 - i) If yes, how did their presence affect you?
 - c) Were there any other outrageous circumstances, such as mocking, laughter, disdain or other forms of rudeness by the offending party(ies)?
 - d) Were you lied to by the discriminator(s)?
 - i) When/how did you find out?
 1. How did you feel when you found out?
- 11) On how many occasions were you in contact with the perpetrator(s)?
 - a) Describe what was said or done on each occasion.
 - b) What was your immediate psychological reaction to the discriminatory treatment?
- 12) Did you experience any of the following common symptoms? (provide details/examples under each applicable category):

- a) emotional numbing, feeling stunned;
- b) withdrawal (usually to the home, bed, and away from those in the home; often the client requests that she be left alone.);
- c) helplessness;
- d) anger (if yes, how intense?);
- e) feelings of inadequacy;
- f) anxiety;
- g) panic attacks;
- h) constant reliving of the incident (interference with concentration);
- i) confusion;
- j) loss of control over matters that affect you;
- k) feeling unwanted, unworthy, unappealing;
- l) humiliation;
- m) sleep disturbance;
- n) embarrassment;
- o) depression;
- p) lethargy, inability or unwillingness to care for self or others, not wanting to get out of bed or leave the home;
- q) staying home from work or school? (If yes, give exact dates.) For days missed at work, was there a loss of pay? What excuse was given to the employer? Any negative ramifications on the job or at school for missed days? Get copies of time/attendance records or pay stubs for corroboration;
- r) inability to face day-to-day responsibilities;
- s) diminished self-esteem;
- t) negative changes in appearance ("letting yourself go");
- u) irritability, lack of patience;
- v) feelings of shock or disbelief;
- w) tension;
- x) mood swings;
- y) morbid sadness;
- z) mirthless smiling, sighing;
- aa) inability to make decisions;
- bb) engaging in self-destructive acts (overeating, increased/renewed smoking, drinking, involvement with drugs, inappropriate use of medications);
- cc) increased dependency on others;
- dd) lack of humor;
- ee) blaming oneself for what happened;

- ff) feeling generally discouraged;
 - gg) Post Traumatic Stress Disorder (see the American Psychiatric Association's "Diagnostic and Statistical Manual of Mental Disorders," commonly called the "DSM IV").
- 13) Compare the client's feelings and behavior before the incident with the feelings and behavior described in section 5 above.
 - 14) In what ways have the client's reactions to the incident changed over time, for better or worse?
 - 15) Have you experienced any physical reactions to the discriminatory treatment? Provide complete details under each category. (The physical symptoms may be new to the client or an exacerbation of past ailments. For example, the client may either experience a stomach ulcer for the first time or an aggravation of an existing ulcer.)
 - 16) Have you experienced any of the following physical symptoms?:
 - a) hypertension;
 - b) ulcers or upset stomach/indigestion;
 - c) headaches (including migraines);
 - d) asthma;
 - e) arthritis;
 - f) loss of sleep/insomnia;
 - g) easily startled (hyper-arousal);
 - h) crying (if yes, describe the occasions upon which you cried before the incident and compare with the frequency and extent of crying after the incident);
 - i) loss of appetite;
 - j) diminished interest in physical pleasures (sex, exercise, eating);
 - k) neck/back pain.
 - 17) In the case of both psychological and physical reactions, was a doctor or other health care provider consulted? Whom did you consult? For what length of time? Cost? Was medication prescribed or increased?
 - 18) Were your interactions with friends or family affected? If so, how? (This is a very common and often destructive result of discrimination. Pay particular attention to this inquiry. Methodically probe into each affected relationship. Consider calling the affected person as a witness to corroborate changes in your client's behavior.)

- 19) Describe whether and/or how you told your wife, husband, partner, children, or friends about the incident.
- 20) If you have not told people you would ordinarily confide in about the incident, why not?
- 21) Has the incident affected you on the job?
- 22) Has your job performance been adversely affected? In what ways? Give details.
- 23) Have there been any job performance evaluations since the incident? Any changes from pre-incident evaluations?
- 24) Has the incident affected your relationship with peers or superiors on the job? How so?
- 25) Has the incident changed the way you interact with or view people of the same class (race, gender, national origin, etc.) as the discriminator(s)?
- 26) Has the incident changed your outlook?:
 - a) on life;
 - b) on your beliefs (Do you find yourself thinking, "I worked hard, played by the rules and still was not treated fairly"?);
 - c) regarding the faith you had placed in those you had relied on ("my parents never prepared me for this");
 - d) regarding current events (becoming more conscious of racism and other forms of discriminatory behavior);
 - e) regarding your prospects for the future.
- 27) How often do you think about the incident? Has that changed over time?
- 28) Have there been other stress-producing events in your life that would account for the above-listed changes? What are they? When did they occur? How did you react to them? How was/is your reaction to the other stressors different from your reaction to the discriminatory treatment? Could these, or other stressors be the cause of any of the changes listed above? If not, why not?
- 29) Who can corroborate any of the psychological and/or physical changes listed above? It is often very helpful (though not legally necessary) to have family members, friends, work associates, and health care professionals corroborate the changes you experienced.

- 30) Have you continued the search for housing? Have you modified the search in any way (restricted the search to neighborhoods where you are not likely to encounter future discrimination, felt it necessary to “announce” your membership in the protected class over the phone or in person, etc.)?
- 31) What will it take for you to feel fully recovered? Do you think that therapy is required? If so, how long do you think the therapy will need to continue? Would validation or vindication at trial aid the healing process?
- 32) How long will it take you to recover fully?



HOMELESS LEGAL ADVOCACY: NEW CHALLENGES AND DIRECTIONS FOR THE FUTURE

*Jonathan L. Hafetz**

When large numbers of homeless people began appearing on the streets of American cities in the late 1970s, a sense of crisis galvanized advocates, the media, and policymakers.¹ Now, over two decades later, there are more homeless people than ever, and numbers are rising rapidly, particularly among families with children.² The economic expansion of the 1990s not only failed to end the crisis, but also placed greater pressure on housing markets, driving up rents and increasing the scarcity of affordable housing for low-income individuals and families.³ The recent recession has caused a sharp increase in the homeless population, once again making homelessness front-page news.⁴

Yet, the sense of shock and emergency has all but vanished. Homelessness has been studied exhaustively by social scientists and covered extensively in the media. Programs and services for homeless people have become permanent and institutionalized, with a system of public and private shelters, an array of service providers, and legal rules governing the rights of homeless people.⁵ What was once seen as a temporary crisis has become a fixed part of the social and political landscape.

This Article examines the role of lawyers for homeless people.⁶ It argues that while even the most zealous legal advocacy cannot

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1. See *infra* text accompanying notes 18-19.

2. See *infra* note 40.

3. See MARTHA BURT ET AL., HELPING AMERICA'S HOMELESS: EMERGENCY SHELTER OR AFFORDABLE HOUSING? 10 (2001).

4. See, e.g., Editorial, *Ending Chronic Homelessness*, N.Y. TIMES, Mar. 13, 2002, at A24; Pam Belluck, *New Wave of the Homeless Floods Cities' Shelters*, N.Y. TIMES, Dec. 18, 2001, at A1; Leslie Kaufman & Keven Flynn, *New York's Homeless, Back Out in the Open*, N.Y. TIMES, Oct. 13, 2002, § 1, at 1; Alexandra Marks, *US Shelters Swell—With Families*, CHRISTIAN SCI. MONITOR, Nov. 29, 2001, at 1.

5. See Martha R. Burt, What Will It Take To End Homelessness (describing the substantial growth of the homeless service system in the 1990s, including an increase in available beds from 275,000 in 1988 to 607,000 in 1996), at http://www.urban.org/housing/homeless/end_homelessness.html (last visited Mar. 15, 2003).

6. See *infra* Part II.

alone solve homelessness, it remains an important tool because of the assistance it provides to individuals, its impact on broader legal rules, and its potential role in shaping public perception and debate.⁷

The Article also maintains that legal advocacy works best when combined with a holistic approach that addresses homeless clients' non-legal needs, such as housing placement, case management, medical and psychiatric care, job training, and substance abuse counseling.⁸ It further argues that, to the extent possible, lawyers for homeless people should focus their efforts and resources around those areas that research and experience have identified as the leading causes of homelessness and the most open to solutions.⁹

Part One summarizes the growth of homelessness during the past two decades. It then describes its most prominent features and underlying causes.

Part Two describes the evolution of homeless legal advocacy. First, it looks at the initial wave of litigation during the 1980s over the right to emergency shelter for the homeless. It then examines the second phase of litigation during the 1990s that challenged the attempts by municipalities to reduce the visible homeless population through various measures, such as anti-vagrancy, anti-camping, and "quality of life" ordinances. While this litigation has led to important victories and captured the public's attention (though not always its wholehearted support), it remains only a part of the picture. Suing over the right to emergency shelter or the right to panhandle on streets or sleep in parks is critical to many homeless people, but it does not address the underlying causes of homelessness, such as the crisis of affordable housing, decreasing income and public benefit levels, and lack of access to other needed services.

Part Three outlines the continued importance of legal advocacy for the homeless. It addresses critiques of legal service models, and it explains why legal representation, though inherently limited, remains vital to this vulnerable and disempowered population. It then argues that, where possible, such representation should be tailored to the problems that research and experience have shown to be the most significant causes of homelessness and that may be addressed through legal advocacy. It also discusses the potential of litigation to affect public debate and dispel negative stereotypes

7. *See infra* Part III.

8. *See infra* Part III.

9. *See infra* Part III.

about homeless people. It next describes the importance of developing models of legal advocacy in holistic settings where critical non-legal needs of homeless people may be met. While lawyers will not solve a problem as complex and deeply rooted as homelessness, they still have an important role to play.

I. HOMELESSNESS AND ITS CAUSES

There have always been homeless people in America.¹⁰ It was not until the nineteenth century, however, that a large group of transient, family-less laborers became institutionalized in American cities.¹¹ During the worst years of the Great Depression of the 1930s, when one-quarter of the workforce was unemployed, the number of homeless people skyrocketed, reaching as many as 1.5 million.¹² In the 1950s and 1960s, over a million people, many with a history of mental illness and/or chemical dependency, lived in sub-standard housing in skid row areas that were growing closer to expanding commercial and administrative activities.¹³ What has changed is the nature of homelessness, the public's understanding of the term, and the perception of homeless people themselves.¹⁴

Since the late 1970s, the number of people without a place to sleep at night has steadily grown.¹⁵ Even during the economic boom of the 1990s, homelessness increased.¹⁶ In contrast to the 1950s and 1960s, when many homeless were single male adults sleeping in cubicle and residential, single room occupancy hotel rooms ("SROs"), the last two decades have seen a sharp increase in the number of homeless people living on the street, including

10. See KENNETH L. KUSMER, *DOWN AND OUT, ON THE ROAD: THE HOMELESS IN AMERICAN HISTORY* 3-5 (2002); PETER H. ROSSI, *DOWN AND OUT IN AMERICA: THE ORIGINS OF HOMELESSNESS* 17 (1989); see also E.L. Bassuk & D. Franklin, *Homelessness Past and Present: The Case of the United States, 1890-1925*, 8 *NEW ENG. J. PUB. POL'Y* 67, 68 (1992) (noting that the profile of homeless people partly reflects the country's social history).

11. KUSMER, *supra* note 10, at 147-67.

12. See ROSSI, *supra* note 10, at 22.

13. See Jim Baumohl & Kim Hopper, *Redefining the Cursed Word: A Historical Interpretation of American Homelessness*, in *HOMELESSNESS IN AMERICA* 10 (Jim Baumohl ed., 1996).

14. See, e.g., KUSMER, *supra* note 10, at 239-42 (describing differences between the "old" homeless and the "new" homeless, who began to appear in the mid-1970s); cf. BURT ET AL., *supra* note 3, at 3-4 (noting that, in leading studies of the 1950s and 1960s, homelessness was equated with living outside family units, whereas today its meaning is linked more closely to lack of housing or to living in shelters specifically provided for homeless people).

15. See Baumohl & Hopper, *supra* note 13, at 10.

16. See BURT ET AL., *supra* note 3, at 10.

single women and families.¹⁷ The term “the new homeless” has been used to describe this new, more diverse homeless population.¹⁸ The past two decades have seen an unprecedented expansion of national media attention, legal activity, government programs, and not-for-profit service providers.

A. Defining the Term and Estimating the Number

The term “homeless” is itself of recent origin, purportedly coined by advocates in late 1970s to describe the troubling phenomenon of countless individuals, mostly adult males, sleeping on the streets, in parks, and in other public places.¹⁹ Broad definitions of the term include not only those people living on the streets and in shelters, but also those who, lacking a home of their own, are doubled-up with relatives or friends.²⁰ A narrower, more commonly used definition limits homelessness to those individuals who lack a fixed and regular address and whose primary night-time residence is a public or private place “not designed for, or ordinarily used as, a regular sleeping accommodation for human beings,” or a shelter or similar facility designed to provide “temporary living accommodations” for persons with no other residence.²¹ How the term is defined has important consequences, affecting popular sentiment, the allocation of public resources, and the delivery of care by service providers.²² The term has also proven useful to advocates in arousing public concern and fighting for the right to shelter.²³ Some commentators note, however, that it has also shifted the focus away from those not literally “homeless,” but nonetheless

17. See Rossi, *supra* note 10, at 34-35.

18. Gary Blasi, *Advocacy and Attribution: Shaping and Responding to Perceptions of the Causes of Homelessness*, 19 ST. LOUIS U. PUB. L. REV. 207, 218 (2000).

19. JAMES D. WRIGHT, ADDRESS UNKNOWN: THE HOMELESS IN AMERICA 19-21 (1989).

20. *Id.* at 27-28; see Peter H. Rossi & James D. Wright, *The Urban Homeless: A Portrait of Dislocation*, 501 ANNALS AM. ACAD. POL. & SOC. SCI. 132, 134 (1989) (using a definition of homelessness that included the “literally homeless” and the “precariously, or marginally housed persons” with a tenuous or temporary claim to a dwelling of marginal adequacy).

21. See McKinney-Vento Homeless Assistance Act, *renamed*, Stewart B. McKinney Homeless Assistance Act, 42 U.S.C. § 11301 (1995); BURT ET AL., *supra* note 3, at 6 (noting that the official definition narrows the homeless to “a fairly small proportion of the precariously housed or unhoused population”).

22. See, e.g., Rossi, *supra* note 10, at 45; see also KUSMER, *supra* note 10, at 4 (noting that counting only those “without domicile” underestimates the level of homelessness in society).

23. See Lucie E. White, *Representing “The Real Deal,”* 45 U. MIAMI L. REV. 271, 291-92 (1990-91).

with significant shelter problems,²⁴ and limited the growth of more broadly based anti-poverty coalitions.²⁵ The use of the term can also obscure just how diverse the homeless population is in its demographic composition and legal needs.

Estimating the size of the homeless population has been a significant source of controversy since homelessness galvanized national attention over two decades ago.²⁶ Estimates vary depending on the methodology used, including whether a particular homeless count is measured on a given day or over a period of time.²⁷ In the late 1970s, advocate Mitch Snyder claimed that over one million people were homeless; in 1982, he and Mary Ellen Hombs raised their estimate to between two to three million.²⁸ Some social scientists contended that those figures were exaggerated.²⁹ A 1984 study by the United States Department of Housing and Urban Development ("HUD") estimated that between 250,000 to 350,000 people were homeless;³⁰ a 1987 study by the Urban Institute put the number at between 500,000 and 600,000 people;³¹ a 1990 national survey based on telephone interviews of over 1,500 adults estimated that

24. *See id.* at 300.

25. Gary Blasi, *And We Are Not Seen: Ideological and Political Barriers to Understanding Homelessness*, 37 AM. BEHAV. SCIENTIST 563, 564 (1994) (suggesting that advocates should have fought for the rights of all those living in extreme poverty, rather than focusing only on those who were homeless).

26. *See* BURT ET AL., *supra* note 3, at 24 (calling estimates of the number of homeless people "political footballs").

27. *See* Nat'l Coalition for the Homeless, *How Many People Experience Homelessness?*, available at <http://www.nationalhomeless.org/numbers.html> (last visited Mar. 15, 2003). In addition, studies often fail to count accurately the numerous homeless people who are not in places researchers can easily locate. *See id.*; *see also* Rossi, *supra* note 10, at 46-52 (stating that not only do census counts often miss homeless people, but also that those attempting to count the homeless face other problems, such as the transience of the homeless population and difficulty identifying who is homeless).

28. CHRISTOPHER JENCKS, *THE HOMELESS* 1-2 (1994); *see* VICTORIA RADER, *SIGNAL THROUGH THE FLAMES: MITCH SNYDER AND AMERICA'S HOMELESS* 144 (1986) (describing the role of Snyder, Hombs, and others at the Center for Creative Non-Violence in raising public awareness about homelessness).

29. *See, e.g., id.* at 1-2 (suggesting that Snyder knew that statement was inaccurate when he made it).

30. *See* MARTHA R. BURT, *OVER THE EDGE, THE GROWTH OF HOMELESSNESS IN THE 1980s*, at 211 (1992). The HUD study was not without critics of its own. *See, e.g.,* Kim Hopper, *Whose Lives Are These Anyway?*, 17 URB. & SOC. CHANGE REV. 12, 12-13 (1984). The study also sparked litigation over its methodology. *See generally* Cmty. for Creative Non-Violence v. Pierce, 814 F.2d 663 (D.C. Cir. 1987).

31. BURT, *supra* note 30, at 211.

8.5 million people were homeless at some point during the period from 1985 to 1990.³²

Dennis P. Culhane's "path-breaking" study of turnover rates in shelters in New York City and Philadelphia, which produced an unduplicated count of the actual number of homeless people in city shelter systems over a period of time, revealed that three percent of Philadelphia's population used the public shelter system between 1990 and 1992, and that three percent of New York's population received shelter during the same period.³³ The work of Culhane and others conclusively demonstrated that homelessness was a much more widespread problem than the government had previously acknowledged.³⁴ A recent study now estimates that between 700,000 to 800,000 people are homeless each night and that between 2.5 to 3.5 million people experience homelessness each year.³⁵ The recent economic downturn, coupled with the impact of federal welfare reform, appears to have caused another sharp jump in homelessness.³⁶ Yet, debate continues over the number of homeless people who remain outside the growing network of shelter systems.³⁷

Even more debate rages over the causes of homelessness than the number of homeless people. These debates are not merely academic exercises, but influence how scarce public and private resources should be directed. Although the homeless population

32. Bruce G. Link et al., *Lifetime and Five-Year Prevalence of Homelessness in the United States*, 65 AM. J. ORTHOPSYCHIATRY 347, 353 (1995). This same study estimated that approximately 13.5 million adults, or 7.4 percent of the adult population, had at some point in their lives been "literally homeless," which was defined as "street and shelter" homelessness. *Id.*

33. See Dennis Culhane et al., *Public Shelter Admission Rates in Philadelphia and New York City: Implications of Turnover for Sheltered Population Counts*, 5 HOUSING POL'Y DEBATE 107, 107-40 (1994).

34. See Celia W. Dugger, *Study Says Shelter Turnover Hides Scope of Homelessness*, N.Y. TIMES, Nov. 16, 1993, at A1; see also Dennis P. Culhane, *Defining, Counting, and Tracking the Homeless Institution*, in UNDERSTANDING HOMELESSNESS: NEW POLICY AND RESEARCH PERSPECTIVES 5, 7 (Dennis P. Culhane & Steven P. Hornburg eds., 1997).

35. See NAT'L ALLIANCE TO END HOMELESSNESS, A PLAN: NOT A DREAM—HOW TO END HOMELESSNESS IN TEN YEARS 3 (2000), available at <http://www.naeh.org/pub/tenyear/10yearplan.pdf> (last visited Mar. 15, 2003).

36. See, e.g., Mirta Ojito, *Advocacy Group Says Homeless Are Breaking Shelter Records*, N.Y. TIMES, Nov. 20, 2001, at D8 (noting that over 29,000 people were sleeping in New York City's shelters nightly, the highest number in the city's history).

37. See Greg Retsinas, *City Says 1,780 Homeless are Sleeping on Manhattan Streets*, N.Y. TIMES, Mar. 28, 2003, at D8 (discussing controversy over recent attempt to count the number of homeless people on New York City streets).

defies easy generalization,³⁸ years of research and experience indicate several patterns. Single adult men still constitute a majority of homeless Americans,³⁹ although families with children represent one of the fastest growing segments of the homeless population,⁴⁰ making up about one-quarter of the homeless population on a given day.⁴¹

Studies conducted by the National Institutes of Mental Health ("NIMH") during the mid-1980s estimated that twenty to twenty-five percent of homeless single adults had lifetime histories of serious mental illness;⁴² more recent research places the number as high as thirty percent.⁴³ Alcohol and chemical dependency are also significant among homeless people, particularly homeless men.⁴⁴ Furthermore, about half of those with serious mental illnesses also have substance abuse disorders.⁴⁵ Yet, while rates of lifetime mental illness among the homeless are three to five times greater

38. Robert Rosenheck et al., *Special Populations of Homeless Americans*, in U.S. DEP'T OF HOUS. & URBAN DEV. & U.S. DEP'T OF HEALTH AND HUMAN SERVS., PRACTICAL LESSONS: THE 1998 NATIONAL SYMPOSIUM ON HOMELESSNESS RESEARCH 2-1, 2-2 (Linda B. Forsburg & Deborah L. Dennis eds., 1999) [hereinafter PRACTICAL LESSONS].

39. See U.S. Conference of Mayors, A Status Report on Hunger and Homelessness in American Cities, 2000: A 25-City Survey ii (2000) ("[E]stimat[ing] that, on average, single men constitute 44 percent of the homeless population, families with children 36 percent, single women 13 percent and unaccompanied minors seven percent."), available at <http://www.usmayors.org/uscm/hungersurvey/2000/hunger2000.pdf> (last visited Mar. 15, 2003); see also BURT, *supra* note 30, at 13 (estimating that single men constituted seventy-three percent of the adult urban homeless service-using population in 1987).

40. See Nina Bernstein, *Use of Shelters By Families Sets Record in New York*, N.Y. TIMES, Aug. 1, 2001, at A1; Jennifer Egan, *To Be Young and Homeless*, N.Y. TIMES, Mar. 24, 2002, at G32; Rosenheck et al., *supra* note 38, at 2-10 (estimating that families with children now comprise thirty-six percent of the total number of homeless people); Nancy Wright, *Not in Anyone's Backyard: Ending the "Contest of Nonresponsibility" and Implementing Long-Term Solutions to Homelessness*, 2 GEO. J. FIGHTING POVERTY 163, 170-71 (1995).

41. See BURT, *supra* note 30, at 16.

42. See ROSSI, *supra* note 10, at 146 (describing study indicating that one in four Chicago homeless had at least one episode of hospitalization in a psychiatric institution); Rosenheck et al., *supra* note 38, at 2-17.

43. Maria Foscarinis, *Downward Spiral: Homelessness and Its Criminalization*, 14 YALE L. & POL'Y REV. 1, 6 (1996) (citing FED. TASK FORCE ON HOMELESSNESS & SEVERE MENTAL ILLNESS, OUTCASTS ON MAIN STREET 7-13 (1992)); see JENCKS, *supra* note 28, at 24 (estimating that about one-third of all homeless people have severe mental illnesses).

44. See, e.g., BURT, *supra* note 30, at 110-11; ROSSI, *supra* note 10, at 156 (describing studies during 1980s showing prevalence of alcoholism as about one-third of the total homeless population).

45. See Rosenheck et al., *supra* note 38, at 2-17.

than rates in the general population, the majority of homeless people do not have a serious mental illness.⁴⁶

Demographic research has yielded other important findings, identifying increasing numbers of homeless women (including those without children),⁴⁷ youth,⁴⁸ the elderly,⁴⁹ and minority groups, particularly African-Americans and Latinos.⁵⁰ The traditional stereotype of a homeless individual was a single, white, male adult addicted to alcohol; today, however, the homeless population is extremely diverse.⁵¹ On a given day, the adult population using homeless assistance programs consists of: single men (sixty-one percent); single women (fifteen percent); households with children (fifteen percent); people with another adult, but not with children (nine percent).⁵²

The common thread connecting these demographic categories—whether based on gender, age, family situation, mental health status, or racial or ethnic background—is extreme poverty.⁵³ In 1994, a total of 38.1 million Americans fell below the federal poverty

46. *See id.*

47. *See id.* at 2-9 (concluding that women now comprise one-fifth of the overall homeless population).

48. *See* Marjorie J. Robertson & Paul A. Toro, *Homeless Youth: Research, Intervention, and Policy*, in PRACTICAL LESSONS, *supra* note 38, at 3 (noting that the size of the homeless youth population, defined as ages twelve to seventeen, is substantial and widespread; estimating that the annual prevalence of literal homelessness among this age group is 7.6 percent, or 1.6 million youth in a particular year).

49. *See* Rosenheck et al., *supra* note 38, at 2-7 to 2-8 (noting that while the proportion of older persons in the total homeless population has declined in recent years, the number of homeless elders, aged fifty and above, has increased and will likely increase further as “increasing numbers of baby-boomers reach older adulthood.”); *see also* Nat’l Coalition for the Homeless, *Homelessness Among Elderly Persons*, at <http://www.nationalhomeless.org/causes.html> (last visited Mar. 15, 2003).

50. *See* Rosenheck et al., *supra* note 38, at 2-13 (“Blacks and Latinos in America are far more likely than other Americans to be poor and therefore, more likely to be homeless.”). The relatively high percentage of African-Americans who are homeless is also a product of the gap in wealth between African-Americans and whites, the loss of jobs in the inner city, and housing segregation. *See id.* at 2-14 to 2-15.

51. *See generally* Kim Hopper & Jill Hamburg, *The Making of America’s Homeless: From Skid Row to the New Poor, 1945-1984*, in CRITICAL PERSPECTIVES ON HOUSING 13 (R.G. Bratt et al. eds., 1986).

52. *See* BURT ET AL., *supra* note 3, at 57.

53. *See* Foscarnis, *supra* note 43, at 6; White, *supra* note 23, at 276; *see also* BURT ET AL., *supra* note 5, at 55 (concluding that extreme poverty is the most important predictor as to whether an individual is homeless); Rossi, *supra* note 10, at 8; *cf.* Wes Daniels, *Symposium on Law and the Homeless: An Introduction*, 45 U. MIAMI L. REV. 261, 262 (1990-91) (“Homelessness represents the far end of a spectrum, and the tip of an iceberg to which people have paid more attention than to the serious underlying problems of which homelessness is simply one symptom.”).

line, 5.6 million more than in 1989.⁵⁴ Indeed, homeless people are poorer today than ever before.⁵⁵ Although in 2000 the overall poverty level dropped to record low rates, the average poor person continued to fall further below the poverty line.⁵⁶ In addition, the income gap between high- and low-income families remained at or near the highest levels since before World War II.⁵⁷ The shrinkage of government assistance programs like welfare and food stamps partly explains these trends.⁵⁸

While extreme poverty does not necessarily cause people to become homeless, it makes them more vulnerable to homelessness,⁵⁹ which may be triggered by what to others might seem only temporary setbacks, such as the loss of a job. Indeed, between five and ten percent of poor people experience homelessness during a given year.⁶⁰ Thus, an understanding of the close connection between poverty and homelessness must inform and drive homeless legal advocacy.

B. Causes of Homelessness

Beliefs about the causes of homelessness tend to reflect fundamentally different attitudes towards social welfare policy and the role of the state in society. Generally, liberals emphasize how the shortage of affordable housing, changes in federal housing policy, and the reduction in the purchasing power of public benefits have all led to higher rates of homelessness. Conservatives, by contrast, stress personal failures like mental illness, alcoholism, and drug abuse in explaining the persistence of homelessness. Thus, while liberals favor government intervention through expanding housing and cash assistance programs, conservatives believe such intervention cannot help and may indeed worsen the problem by inhibiting individual initiative and responsibility.⁶¹

54. See Foscarinis, *supra* note 43, at 10.

55. See, e.g., Rossi, *supra* note 10, at 40 (noting that the new homeless in Chicago have one-third the income level of the homeless in 1958).

56. See Press Release, Center on Budget and Policy Priorities, Poverty Rates Fell in 2000 As Unemployment Reached 31-Year Low (Sept. 26, 2001), *available at* <http://www.centeronbudget.org/9-25-01pov.htm> (last visited Mar. 15, 2003); see also Genaro C. Armas, *Census: Rich got Richer in the 90s*, ASSOC. PRESS, June 4, 2002 (noting that the poverty rate increased in many states despite a decade of economic prosperity).

57. See Press Release, Center on Budget and Policy Priorities, *supra* note 56.

58. See *id.*

59. See Rossi, *supra* note 10, at 77.

60. See BURT ET AL., *supra* note 5, at 116-17.

61. See White, *supra* note 23, at 279-81. The public is similarly divided over the primary cause of poverty, with roughly half saying that a person is poor due to lack of

In fact, there is a growing consensus that both structural and individual factors play a role in causing homelessness.⁶² While structural factors make people more vulnerable to becoming homeless, personal factors often determine who is pushed over the edge. On the other hand, while there are relatively higher rates of chemical dependency and mental illness among homeless people,⁶³ the issue is why those problems lead to homelessness in some people, but not others. Understanding the complex interplay of these multiple causes should help shape future homeless legal advocacy. This Section identifies some of these causes.

1. *Structural Changes in the Economy*

The growing inequality and poverty in today's global economy is an important cause of homelessness.⁶⁴ The loss of relatively high paying manufacturing jobs following the recession of the early 1980s, and their replacement with lower paying, less-stable service jobs, has contributed to the spread of homelessness.⁶⁵ Low-wage workers have been affected dramatically; for example, the real value of the minimum wage (adjusted for inflation) declined over eighteen percent from 1979 to 1997,⁶⁶ making housing unaffordable

individual effort, and the other half blaming poverty on external circumstances beyond a person's individual's control. See DEMOS, *NEW OPPORTUNITIES? PUBLIC OPINION ON POVERTY, INCOME INEQUALITY AND PUBLIC POLICY: 1996-2001*, at 2 (2001), available at <http://www.demos-usa.org> (last visited Mar. 15, 2003).

62. See BURT ET AL., *supra* note 3, at 8; see also STEVEN VANDERSTAAY, *STREET LIVES: AN ORAL HISTORY OF HOMELESS AMERICANS* 72-77 (1992) (noting that homelessness often results from the interaction of economic forces and personal factors).

63. See *supra* notes 44-45 and accompanying text.

64. I. Susser, *The Construction of Poverty and Homelessness in U.S. Cities*, 25 ANN. REV. ANTHROPOLOGY 411, 412-13 (1996); see JOEL F. HANDLER & YEHESKEL HASENFELD, *WE THE POOR PEOPLE: WORK, POVERTY, AND WELFARE* 13 (1997) ("[T]he gap between the rich and the poor in the United States is the widest since the end of World War II.").

65. See, e.g., BURT, *supra* note 30, at 78-79 (noting that half the jobs created between 1979 to 1987 were low-wage jobs); KUSMER, *supra* note 10, at 240 ("Deindustrialization and the shift to a high-tech and service economy eliminated many unskilled or semi-skilled jobs, with disastrous effects on factory workers and young people entering the labor force without adequate education.").

66. Nat'l Coalition for the Homeless, *Why Are People Homeless?*, at <http://www.nationalhomeless.org/causes.html> (last visited Mar. 15, 2003); see LAWRENCE MISHAL & DAVID M. FRANKEL, *THE STATE OF WORKING AMERICA* 3-4 (1991) (describing declining incomes among low wage workers during the 1980s).

for many workers. Moreover, many of these low-wages jobs remain inaccessible to the extremely poor and homeless.⁶⁷

2. *The Lack of Affordable Housing*

A central cause of increased homelessness is the decline in affordable housing, generally defined as a unit available for thirty percent of a household's income.⁶⁸ The period from 1973 to 1993 saw the disappearance of 2.2 million low-rent units from the market through abandonment, conversion to more expensive apartments, and rising costs.⁶⁹ By 1995, the number of low-income renters exceeded the number of low-cost rental units by 5.4 million units.⁷⁰ In total, the number of affordable housing units for families with extremely low incomes (thirty percent of area median income), has declined by over 370,000 units since 1991.⁷¹ Because so many poor families spend over thirty percent of their income on housing, any slight downturn in their economic circumstances can precipitate the downward spiral towards homelessness.⁷²

Also, only about one-third of low-income renter households receive any housing subsidies.⁷³ The number of poor families receiving federally subsidized housing has decreased over time.⁷⁴ The continued spread of homelessness is hardly surprising given the rising cost of housing, the increasing rent burden of poor families,⁷⁵ the overall decline of the inexpensive housing stock (particularly in large cities)⁷⁶ the destruction of cheap housing, including SROs

67. See Christina Victoria Tusan, Note, *Homeless Families From 1980-1996: Casualties of Declining Support for the War on Poverty*, 70 S. CAL. L. REV. 1141, 1168 (1997).

68. JENNIFER DASKAL, CTR. ON BUDGET & POLICY PRIORITIES, IN SEARCH OF SHELTER: THE GROWING SHORTAGE OF AFFORDABLE RENTAL HOUSING 9-12 (1998).

69. *Id.* at 1.

70. See *id.*

71. See John J. Ammann, *Housing Out the Poor*, 19 ST. LOUIS U. PUB. L. REV. 309, 311 (2000).

72. See Rossi, *supra* note 10, at 9; see also Michael H. Schill & Benjamin P. Scafidi, *Housing Conditions and Problems in New York City*, in HOUSING AND COMMUNITY DEVELOPMENT IN NEW YORK CITY: FACING THE FUTURE 11, 33 (Michael H. Schill ed., 1999) [hereinafter HOUSING AND COMMUNITY DEVELOPMENT] (noting that the affordability crisis is predominantly a crisis for the poor in New York City).

73. See DASKAL, *supra* note 68, at 4.

74. See Tusan, *supra* note 67, at 1176.

75. See, e.g., BURT, *supra* note 30, at 46-47 (noting that the proportion of poor renters paying more than thirty percent of income is growing and that such renters often pay over half of their income for rent alone).

76. See Rossi, *supra* note 10, at 182; see also Michael S. Carliner, *Homelessness: A Housing Problem?*, in THE HOMELESS IN CONTEMPORARY SOCIETY 119 (Richard D. Bingham et al. eds., 1989) (describing the shift of older urban housing stock to higher

and rooming houses,⁷⁷ the relative decline in units created by the federal government starting in the 1980s,⁷⁸ and the decline in federal subsidies such as the Section 8 Rental Assistance Program.⁷⁹ "Opt-outs" from HUD contracts continue to erode the number of federally subsidized units.⁸⁰ Meanwhile, waiting lists for HUD-assisted housing grow longer.⁸¹

Increasing numbers of people do not have the income, whether through wages or government cash transfer programs, to secure housing.⁸² In 1991, there were eight million very poor renters, but only three million units were available to them;⁸³ a more recent study found that the number of rental units available to extremely low-income families dropped by five percent between 1991 and 1997, a decline of over 370,000 units.⁸⁴ While the federal government has responded to homelessness with some emergency assistance, it has failed to forge a national commitment to help establish affordable housing for the poor.⁸⁵ Affordable housing may not

income groups, rather than to poor people, because of gentrification and the increase of affluent non-family households and childless couples).

77. See Rossi, *supra* note 10, at 182 (citing a study that found that 18,000 single-person dwelling units in SROs and small apartment buildings disappeared between 1973 to 1984); Foscarinis, *supra* note 43, at 8 (finding that the number of people living in hotels and rooming houses declined from 640,000 in 1960 to 137,000 in 1990); Barrett A. Lee, *The Disappearance of Skid Row: Some Ecological Evidence*, 16 URB. AFF. Q. 81, 81-107 (estimating that urban renewal in the 1960s and later conversation of rejuvenation of neighborhoods led to the national loss of approximately 1,116,000 units in SROs and accommodations in boarding or lodging houses); cf. JENCKS, *supra* note 28, at 74 (contending that the destruction of skid row neighborhoods made it harder to create housing for the poor when their numbers and demand began to grow again in the 1980s).

78. See BURT, *supra* note 30, at 32 (contrasting 1.5 million rental units added in the 1970s through federal programs, which represents thirty-one percent of the total growth in rental stock during that decade, with the 877,000 units added in the 1980s, which represents fourteen percent of the rental units added in that period).

79. See Cara Hendrickson, *Racial Desegregation and Income Deconcentration in Public Housing*, 9 GEO. J. POVERTY L. & POL'Y 35, 39 (2002).

80. See, e.g., Victor Bach, *The Future of HUD-Subsidized Housing: The New York City Case*, in HOUSING AND COMMUNITY DEVELOPMENT, *supra* note 72, at 157.

81. U.S. DEP'T OF HOUS. & URBAN AFFAIRS, WAITING IN VAIN: AN UPDATE ON AMERICA'S HOUSING CRISIS 7-11 (1999); Ammann, *supra* note 71, at 310 (noting that a recent HUD survey of forty public housing authorities found almost one million families on the waiting lists for public housing and Section 8 rental assistance).

82. See White, *supra* note 23, at 288 (describing the growth of the "shelter poor").

83. INTERAGENCY COUNCIL ON THE HOMELESS, PRIORITY: HOME! THE FEDERAL PLAN TO BREAK THE CYCLE OF HOMELESSNESS 22-23 (1994).

84. See OFFICE OF POLICY DEV. RESEARCH, U.S. DEP'T OF HOUS. & URBAN DEV., RENTAL HOUSING ASSISTANCE—THE WORSENING CRISIS: A REPORT TO CONGRESS ON WORST CASE HOUSING NEEDS 22 (2000).

85. See White, *supra* note 23, at 296.

alone be sufficient to end homelessness in every case (many homeless people need services in the community as well), but it is always a necessary part of the solution.⁸⁶

3. *Increasing Restrictions on Public Assistance*

Restrictions on eligibility for public assistance and the relative decline in grant levels in the past two decades⁸⁷ have contributed to homelessness by reducing the purchasing power of the poor.⁸⁸ A state's payments under Aid to Families with Dependent Children ("AFDC")—the former federal welfare program—for a family of three declined in real terms by forty-seven percent between 1970 and 1994.⁸⁹ State general assistance payments for single adults have also sharply declined, and, in a few states, have been cut altogether.⁹⁰ Indeed, the fact that single adults receive lower grants under general assistance programs than families under welfare helps explain why, traditionally, more single adults have been homeless than families.⁹¹ The decline in the real value of cash assistance, coupled with the loss of low-paying unskilled jobs, has made it particularly difficult for at-risk populations, such as the mentally ill and chemically dependent, to stay housed.⁹² Absent receipt of a housing subsidy, welfare payments alone are generally insufficient for someone to leave homelessness for permanent housing. Indeed, even a recipient of Supplemental Security In-

86. Cf. Marybeth Shinn et al., *Predictors of Homelessness Among Families in New York City: From Shelter Request to Housing Stability*, 88 AM. J. PUB. HEALTH 1651, 1655 (1998) (showing that subsidized housing was the critical factor in families' remaining in permanent housing after leaving shelters).

87. This refers principally to: federal welfare, formerly Aid to Families with Dependent Children ("AFDC"), now Temporary Assistance to Needy Families ("TANF"); general assistance (or general relief) provided by the states to those who do not qualify for TANF funds, such as single adult men; and Supplemental Security Income ("SSI"), the federal program providing cash assistance to disabled, blind, or elderly people who meet income and resource requirements.

88. Nancy Morawetz, *Welfare Litigation to Prevent Homelessness*, 16 N.Y.U. REV. L. & SOC. CHANGE 565, 566-67 (1987-88); Wright, *supra* note 40, at 176 (discussing evidence linking cuts in public assistance to a rise in homelessness); *see also* BURT, *supra* note 30, at 63, 84-85; Rossi, *supra* note 10, at 143 (noting the importance of welfare as a guard against homelessness).

89. Mark Greenberg & Jim Baumohl, *Income Maintenance: Little Help Now, Less on the Way*, in HOMELESSNESS IN AMERICA, *supra* note 13, at 68.

90. *See id.* at 74.

91. *See* BURT ET AL., *supra* note 3, at 130.

92. *See* BURT, *supra* note 30, at 212-13; JENCKS, *supra* note 28, at 93 (arguing that "the main problem facing single mothers during the 1980s was legislative stinginess," and noting that for single mothers with incomes below \$10,000 who lived in unsubsidized housing, real rents rose by thirteen percent during this period, while welfare checks rose by far less).

come ("SSI"), whose monthly cash grant is higher than that of welfare recipients, must spend, on average, almost seventy percent of her monthly grant to rent a one-bedroom apartment.⁹³

The 1996 federal welfare reform act⁹⁴ has intensified the problem of inadequate income and increased the risk of homelessness among at-risk populations. The act replaces the federal entitlement to welfare benefits with block grants to the states under the Temporary Assistance to Needy Families ("TANF") program.⁹⁵ It also imposes a five-year lifetime cap on receipt of assistance, mandates strict work requirements,⁹⁶ and affords greater discretion to states and localities in administering benefits and determining eligibility rules,⁹⁷ a process generally known as "devolution." These changes have made it more difficult for people both to obtain and maintain welfare benefits.⁹⁸ The evidence thus far indicates that while more families are moving from welfare to work, they are not escaping poverty because of low wages and inadequate work supports, including childcare.⁹⁹ Indeed, welfare caseloads declined forty-two percent between 1993 and 1998, but the number of households with incomes below fifty percent of the poverty level has increased, notwithstanding the strong economy during that period.¹⁰⁰ While the impact of the 1996 reforms on homelessness has not yet been fully determined, existing evidence indicates that the housing problems of families leaving welfare are growing worse.¹⁰¹

93. See Nat'l Coalition for the Homeless, *supra* note 66.

94. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"), Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified in scattered sections of 42 U.S.C.).

95. See 42 U.S.C. § 607 (2002).

96. See *id.* §§ 607-608 (detailing mandatory work requirements and sanctions for non-compliance).

97. See *id.* § 617.

98. See Matthew Diller, *The Revolution in Welfare Administration Rules, Discretion, and Entrepreneurial Government*, 75 N.Y.U. L. REV. 1121, 1126 (2000).

99. CHILDREN'S DEF. FUND & NAT'L COALITION FOR THE HOMELESS, WELFARE TO WHAT: EARLY FINDINGS ON FAMILY HARDSHIP AND WELL-BEING 16-17 (1998); Nina Bernstein, *In Control Group, Most Welfare Recipients Left the Rolls Even Without Reform*, N.Y. TIMES, Feb. 29, 2002, at B4; Peter Edelman, *Reforming Welfare—Take Two*, NATION, Feb. 4, 2002, available at <http://www.thenation.com/doc.mhtml?i=20020204&s=edelman&c=1> (last visited Mar. 15, 2003).

100. See Diller, *supra* note 98, at 1123.

101. See PAMELA LOPREST, URBAN INST., HOW ARE FAMILIES THAT LEFT WELFARE DOING? A COMPARISON OF EARLY AND RECENT WELFARE LEAVERS I (2001), available at http://newfederalism.urban.org/pdf/anf_b36.pdf (last visited Mar. 15, 2003). The reauthorization of TANF in 2002 has provided an opportunity for proposals to implement changes that makes housing assistance part of welfare policy. See BARBARA SARD & MARGY WALLER, THE BROOKINGS INST.: CTR. ON URBAN AND METRO. POLICY & THE CTR. ON BUDGET & POLICY PRIORITIES, HOUSING STRATE-

4. *Increasing Rates of Incarceration*

Rapidly rising rates of incarceration over the past two decades, coupled with the elimination of programs to prepare prisoners for release into the community,¹⁰² such as prison-based higher education programs,¹⁰³ have also contributed to homelessness.¹⁰⁴ Also, the lack of discharge planning or services causes many inmates to become homeless when they are released from prison, particularly those inmates with a mental illness.¹⁰⁵

A criminal conviction leads to a range of collateral consequences involving the loss of political, civil, and economic rights¹⁰⁶ that can contribute to homelessness. A criminal conviction means vastly decreased employment opportunities,¹⁰⁷ including exclusion from jobs, many requiring a professional license.¹⁰⁸ Other collateral consequences involve potential exclusion from federal housing programs,¹⁰⁹ especially where the offense involves drug-related activ-

GIES TO STRENGTHEN WELFARE POLICY AND SUPPORT WORKING FAMILIES 1 (2002), available at <http://www.brook.edu/dybdocroot/es/urban/publications/sardwallerhousingwelfareexsum.htm> (last visited Mar. 15, 2003).

102. See, e.g., HEATHER BARR, PRISONS AND JAILS: HOSPITALS OF LAST RESORT 49-53 (1999) (discussing the connection between the absence of discharge planning for mentally ill prison inmates and homelessness).

103. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 20411, 108 Stat. 1796, 1828 (codified as amended at 20 U.S.C. § 1070a(b)(8) (1994)) (prohibiting Pell Grant awards to prisoners).

104. See Rosenheck et al., *supra* note 38, at 2-19 (noting that an estimated twenty percent to sixty-six percent of homeless people have been arrested in the past).

105. See, e.g., Nina Bernstein, *Back on the Streets Without a Safety Net*, N.Y. TIMES, Sept. 13, 1999, at B1 (describing release of inmates from Rikers Island jail in New York City).

106. Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153, 154 (1999) ("Among [the consequences] are the loss of voting rights and the right to run for office, rejection from jury service, prohibition on certain public benefits, and the ban on select professional licenses.").

107. See Rosst, *supra* note 10, at 144.

108. See Demleitner, *supra* note 106, at 156.

109. See, e.g., 24 C.F.R. § 960.203(c) (2001) (authorizing local public housing authorities to consider an applicant's prior criminal activity in determining his eligibility for public housing).

ity,¹¹⁰ and the federal welfare and food stamp programs where the illegal activity constitutes a drug-related felony.¹¹¹

5. *Mental Illness*

Another important cause of homelessness is mental illness. While mental illness may be an important factor in understanding homelessness, it must be viewed not in isolation, but in the context of changes in mental health policy. Proportionally no more Americans suffer from mental illness now than a generation ago; yet, mentally ill people make up an increasing proportion of the homeless population.¹¹² Many mentally ill people become homeless after their discharge from health care institutions to the street or shelters.¹¹³ The McKinney-Vento Homeless Assistance Act ("McKinney Act")¹¹⁴ places considerable emphasis on mental illness through funding for supportive housing and homeless outreach programs.¹¹⁵

As the foregoing discussion indicates, homelessness is a complex problem, and cannot be solved solely by lawyers; yet, legal advocacy can make a difference. Both direct experience and social science research suggest that poverty lawyers should focus on overcoming the various barriers to obtaining permanent housing. They also indicate that legal advocacy should, where possible, be integrated into a more holistic approach that focuses on areas such

110. See *id.* § 960.204 (setting forth provisions for denying admission to public housing based on an applicant's engagement in drug-related criminal activity); *id.* § 982.553 (setting forth provisions for denying admission or terminating assistance under Section 8 rental assistance program to individuals or families based on drug-related criminal activity). Illegal drug-related activity can also lead to eviction of existing tenants of federally subsidized housing, even if the tenant did not know about or consent to such activity. See *Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 127-28 (2002).

111. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (to be codified at 21 U.S.C. § 862a); *Recent Legislation*, 110 HARV. L. REV. 983, 983-84 (1997). States, however, may opt out or modify the drug felon bar by passing legislation making clear they are choosing to do so. See 21 U.S.C. § 862a(d) (1999). To date, at least thirty states have either eliminated or modified the ban. See Amy E. Hirsch, *U.S. Drug Laws: The New Jim Crow?: Bringing Back Shame: Women, Welfare, and Criminal Justice*, 10 TEMPLE POL. & CIV. RTS. L. REV. 417, 419 (2001).

112. See BURT, *supra* note 30, at 119-20, 212-13.

113. See Sidney D. Watson, *Discharges to the Streets: Hospitals and Homelessness*, 19 ST. LOUIS U. PUB. L. REV. 357, 358 (2000).

114. 42 U.S.C. § 11301 (a)(1)-(b)(3) (2003).

115. See Latisha R. Brown, *The McKinney Act: Revamping Programs Designed to Assist the Mentally Ill Homeless*, 33 COLUM. J.L. & SOC. PROBS. 235, 241-46 (2000) (describing federal programs under the McKinney Act).

as skills-building and job training, nutrition services, substance abuse counseling, and medical and mental health treatment.

The following part provides an overview of previous trends in homeless legal advocacy. It then suggests the continuing value of such advocacy as well as the need for new approaches.

II. OVERVIEW OF PRIOR LEGAL ADVOCACY

Prior homeless legal advocacy may be divided into two main periods: the efforts during the 1980s to establish a “right to shelter” and other basic needs; and the growing challenges since the 1990s to efforts to criminalize activities associated with homelessness.¹¹⁶ While responses to criminalization measures still remain a major focus of homeless rights advocacy,¹¹⁷ current efforts should also focus on long-term solutions, such as increasing access to affordable housing and topoverity and social service programs.¹¹⁸

A. Right to Shelter

The “right to shelter” cases of the late 1970s and early 1980s were brought at a time when homelessness was becoming increasingly visible in cities, including downtown areas. The growing numbers of people living on the streets was attracting significant media attention.¹¹⁹ For a generation unaccustomed to seeing such extreme poverty amid affluence, the sight of homeless people living on the streets provoked outrage at the situation and sympathy for the victims. Advocates sought to parlay these sentiments into concrete constitutional and statutory rights in cities across the country.

The landmark decision of a New York trial court in *Callahan v. Carey*,¹²⁰ represented the first significant legal recognition of a right to emergency shelter. After the trial court ruled in favor of the plaintiffs on a motion for a preliminary injunction based on a provision in the state constitution guaranteeing the aid, care, and

116. See Foscarinis, *supra* note 43, at 3.

117. See, e.g., Evelyn Nieves, *In Famous Tolerant City, Impatience with Homeless*, N.Y. TIMES, Jan. 18, 2002, at A14.

118. See Maria Foscarinis, *Homelessness and Human Rights: Towards An Integrated Strategy*, 19 ST. LOUIS U. PUB. L. REV. 327, 329 (2000).

119. See Geoffrey Mort, Note, *Establishing A Right to Shelter for the Homeless*, 50 BROOK. L. REV. 939, 941 n.4 (1984) (describing the media attention devoted to homelessness during the early 1980s).

120. No. 79-42582 (N.Y. Sup. Ct. Dec. 5, 1979), *reprinted in* N.Y. L.J., Dec. 11, 1979, at 10.

support of the needy,¹²¹ the plaintiffs and New York City entered into a consent decree requiring the city to provide overnight food and shelter to needy homeless men and to set forth basic standards for the shelters.¹²² In New York, the right to shelter was later extended to women¹²³ and families.¹²⁴ Advocates succeeded elsewhere in winning similar legal victories.¹²⁵ Advocates also successfully brought litigation in several states to increase the amount of housing assistance provided through state welfare grants.¹²⁶ The specter of increasing homelessness played a significant role in these cases.¹²⁷ In addition, advocates won other important legal victories including the right of homeless people to

121. N.Y. CONST. art. XVI, § 1.

122. *Carey*, No. 79-42582, reprinted in N.Y. L.J., *supra* note 120, at 10.

123. *Eldredge v. Koch*, 459 N.Y.S.2d 960, 961 (Sup. Ct.) (extending principles of the *Callahan* decree to homeless women on equal protection grounds), *rev'd on other grounds*, 469 N.Y.S.2d 744 (App. Div. 1st Dep't 1983).

124. *McCain v. Koch*, 511 N.E.2d 62, 63-67 (N.Y. 1987) (requiring that emergency shelter be provided and affirming the court order to permit placement in mass shelters).

125. *See, e.g., Hodge v. Ginsberg*, 303 S.E.2d 245, 247-50 (W. Va. 1983) (upholding right to emergency shelter, food, and medical care under adult protective services statute); Wes Daniels, "Derelicts," *Recurring Misfortune, Economic Hard Times and Lifestyle Choices: Judicial Images of Homeless Litigants and Implications for Legal Advocates*, 45 BUFF. L. REV. 687, 691-93 (1997) (describing successful challenges to bureaucratic obstacles to access to public emergency shelter in a series of cases in California); *id.* at 692-93 (discussing the right to shelter in Philadelphia under local law); *see also* Mort, *supra* note 119, at 940 (noting that "[l]itigation has become the preferred tool of advocacy groups working to improve conditions for the homeless"). The United States Supreme Court has held, however, that the Constitution does not require the federal government to provide shelter for those citizens in need. *See Lindsey v. Normet*, 405 U.S. 56, 74 (1972) ("We are unable to perceive . . . any constitutional guarantee of access to dwellings of a particular quality").

126. *See, e.g., Mass. Coalition for Homeless v. Sec'y of Human Servs.*, 511 N.E.2d 603, 608-15 (Mass. 1987) (holding that the state welfare agency was required under state law to provide additional benefits to welfare recipients who could not otherwise afford housing with their welfare benefits); *Jiggetts v. Grinker*, 533 N.E.2d 570, 575 (N.Y. 1990) (holding that the social services commissioner must provide "adequate" shelter allowance for families on welfare that reflect housing costs in the city); *see also* Norma Rotunno, Note, *State Constitutional Social Welfare Provisions and the Right to Housing*, 1 HOFSTRA L. & POL'Y SYMP. 111, 123 (1996) (describing the successful use of social welfare provisions in state constitutions to combat homelessness and poverty). *But see* *Savage v. Aronson*, 571 A.2d 696, 712 (Conn. 1990) (holding that the reduction of emergency housing assistance did not violate the state constitution, even if individuals had no other permanent housing).

127. *See Mass. Coalition for Homeless*, 511 N.E.2d at 605 ("At the heart of the plaintiffs' grievance is the argument that many families receiving AFDC assistance are or may become homeless because AFDC grants are insufficient to permit them to afford adequate housing."); *Jiggetts*, 533 N.E.2d at 573 ("A schedule establishing assistance levels so low that it forces large numbers of families with dependent children into homelessness does not meet the statutory standard.").

vote,¹²⁸ and the right of families not to be separated and children placed in foster care on account of their homeless status.¹²⁹

While right to shelter litigation achieved some notable judicial victories and helped prompt policies creating and expanding emergency services, it did not carry the day.¹³⁰ Legal victories have since been narrowed¹³¹ and, in some places, eliminated.¹³² In New York City, where right to shelter litigation has had the greatest impact, a settlement was recently reached creating an independent special master panel with extensive powers including oversight and regular evaluation of the city's shelter system, decreasing court involvement, and authorizing the city to expel families from the shelter system if they refuse to accept suitable housing.¹³³ Moreover, the strategy of achieving a right to shelter through the courts has been criticized for failing to address the root causes of homelessness¹³⁴ and for tilting policy away from permanent housing and homeless prevention and towards ad hoc crisis intervention.¹³⁵

128. See *Pitts v. Black*, 608 F. Supp. 696, 710 (S.D.N.Y. 1984) (ordering New York City to allow homeless individuals without a fixed address to vote as long as they had a place they considered their "home base"); K. Scott Mathews, *Rights of the Homeless in the 1990s: What Role Will the Courts Play*, 60 UMKC L. REV. 343, 353-54 (1991) (describing litigation regarding residence requirements).

129. See *Martin v. Gross*, 524 N.Y.S.2d 121, 125 (Sup. Ct. 1987).

130. See EUGENE T. LOWE ET AL., U.S. CONFERENCE OF MAYORS, A STATUS REPORT ON HUNGER AND HOMELESSNESS IN AMERICA'S CITIES 2001: A 27-CITY SURVEY ii, 11 (2001) (noting that more than thirty-seven percent of those people seeking shelter are unable to access it).

131. See *McCain v. Giuliani*, 676 N.Y.S.2d 151, 152 (App. Div. 1998) (imposing restrictions on the right to shelter).

132. Foscarinis, *supra* note 118, at 332 (noting that in Washington, D.C., the right to shelter was eliminated by legislation after city officials facing contempt orders sought changes in the law).

133. See Leslie Kaufman, *New York Reaches Deal to End 20-Year Legal Fight on Homeless*, N.Y. TIMES, Jan. 18, 2003, at A1. The city is also attempting to weaken the Callahan decree by granting shelters the right to evict single adults who fail to observe rules of conduct or comply with social service plans. See Susan Saulny, *City Pursuing Right to Evict From Shelters*, N.Y. TIMES, Mar. 1, 2003, at B1.

134. See Daniels, *supra* note 125, at 728-29; Ronald Slye, *Community Institution Building: A Response to the Limits of Litigation in Addressing the Problems of Homelessness*, 36 VILL. L. REV. 1035, 1050 (1991); White, *supra* note 23, at 296 (contrasting federal housing policy's goal of building homes and communities with federal homeless legislation's goal of crisis assistance and short-term emergency relief); see also BURT ET AL., *supra* note 3, at 242 (noting the findings of a HUD study that most shelters provided few services). Robert Hayes, the lead attorney for the plaintiffs in *Callahan*, believes that the litigation achieved only minor victories at significant expense, though he does note that it helped pressure New York City into transforming formerly abandoned buildings into permanent housing. See Robert M. Hayes, *Homelessness & The Legal Profession*, 35 LOY. L. REV. 1, 8 (1989).

135. See N.Y. CITY INDEP. BUDGET OFFICE, FISCAL BRIEF, GIVE 'EM SHELTER: VARIOUS CITY AGENCIES SPEND OVER \$900 MILLION ON HOMELESS SERVICES 1

Also, advocates in right to shelter litigation have tended to portray their homeless clients as helpless victims of larger structural forces, a stereotype that helped win early victories, but has since proven less successful.¹³⁶

On the other hand, right to shelter advocacy once seemed a promising option and reflected an attempt to force the government to deal with a worsening social problem.¹³⁷ Moreover, the victories were not hollow: shelter, food, and other emergency services were provided to innumerable homeless people through litigation;¹³⁸ in remaining right to shelter jurisdictions such as New York City, they helped force the government to deal humanely with the homeless population and prevent abuses.¹³⁹ Ultimately, however, a right to emergency shelter can only be part of a broader solution.

(2002); Peter W. Salsich, Jr., *Homelessness at the Millennium: Is the Past Prologue?*, 23 STETSON L. REV. 331, 333 (1994) (noting that the shelter system has "raised fears among homeless advocates that the shelter network would create a permanent cycle of dependency"); White, *supra* note 23, at 296; *see also* Tusan, *supra* note 67, at 1210-11 (arguing that shelters provide only emergency services and that more must be done to assist families to regain permanent housing); *cf.* KUSMER, *supra* note 10, at 245 (describing the focus during the 1980s and 1990s on emergency provision of shelter and food, rather than the kind of structural reforms necessary to lift people out of poverty). Criticisms have been aimed not merely at the right to shelter litigation, but more broadly at the expansion of shelters and accompanying services nationwide. *See, e.g.*, Nan Roman, *Why America Can End Homelessness in Ten Years*, 4 HOUSING FACTS & FIGURES, 2002, at 3.

Over the past 15 years we have developed a national infrastructure of shelters, soup kitchens, health clinics, and transitional housing that can largely manage people while they are homeless. But this system is unlikely to end homelessness because it does not address the front-end causes or the back-end solutions to the problem.

Id.

136. *See* Daniels, *supra* note 125, at 708 ("Although lawyers were able to win some significant litigation victories by portraying their homeless clients as unfortunate victims of forces beyond their control, this approach had significant risks, and carried the seeds of its own destruction."); White, *supra* note 23, at 292; *see also* MICHAEL B. KATZ, *THE UNDESERVING POOR* 192-94 (1986) (describing how early, idealized views of the homeless favored volunteerism over broad, sustained policy development).

137. *See, e.g.*, Melannie B. Abbott, *Seeking Shelter Under a Deconstructed Roof: Homelessness and Critical Lawyering*, 64 TENN. L. REV. 269, 304-05 (1997). *But see* JOEL F. HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM* 22-25 (1978) (discussing limits of lawyers' efforts to seek social change through litigation in various areas).

138. *See* Stephen Wizner, *Homelessness: Advocacy and Social Policy*, 45 U. MIAMI L. REV. 387, 391 (1991) (arguing that the job of advocates for the homeless is to respond to their clients' present housing needs, not devise long-term solutions to a broader problem).

139. *See* Leslie Kaufman, *City Is Told To Rethink Shelter At Jail*, N.Y. TIMES, Aug. 20, 2002, at B3 (discussing state court judge's ruling that city could not convert a former jail into homeless shelter to deal with the overflow at the city's family shelter).

B. Criminalization of Homelessness

If early efforts to establish an affirmative right to shelter reflect the expansive hopes of advocates, subsequent challenges to attempts to criminalize behavior associated with homeless people suggest a defensive response to an angry backlash.¹⁴⁰ Local governments have turned increasingly to law enforcement and the criminal justice system to address homelessness, rather than addressing the underlying problems, such as the lack of affordable housing or social services.¹⁴¹ This shift reflects decreased sympathy for homeless people generally and outright hostility towards more visible activities like aggressive panhandling and sleeping in public parks. The reliance on law enforcement as a substitute for social welfare and housing policy¹⁴² is more prevalent in those localities that do not provide sufficient shelter space for their homeless population,¹⁴³ though it also exists in localities where there is a right to shelter.¹⁴⁴

Attempts to regulate the movement and behavior of the poor through threat of imprisonment have a long history. The Elizabethan Poor Law of 1601, which dramatically influenced social welfare policy in America, authorized the imprisonment of able-

intake center, where children must sleep on the floor, but had to find an alternative solution).

140. See, e.g., Nancy A. Millich, *Compassion Fatigue and the First Amendment: Are the Homeless Constitutional Castaways*, 27 U.C. DAVIS L. REV. 255, 264 (1994); see also KATZ, *supra* note 136, at 192 (describing the general trend).

141. See generally NAT'L COALITION FOR THE HOMELESS & NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, *ILLEGAL TO BE HOMELESS: THE CRIMINALIZATION OF HOMELESSNESS IN THE UNITED STATES* (2002) [hereinafter *ILLEGAL TO BE HOMELESS*]; Maria Foscarinis et al., *Out of Sight—Out of Mind?: The Continuing Trend Toward the Criminalization of Homelessness*, 6 GEO. J. ON POVERTY L. & POL'Y 145, 149 (1999). The trend is not entirely new: cities previously used law enforcement to address homelessness, such as in "clean-up" campaigns in skid row districts during the 1950s and 1960s. See Jason Leckerman, *City of Brotherly Love?: Using the Fourteenth Amendment to Strike Down an Anti-Homeless Ordinance in Philadelphia*, 3 U. PA. J. CONST. L. 540, 548 (2001) (noting the passage of the Philadelphia "Sidewalk Behavior Ordinance" in 1999); see also KUSMER, *supra* note 10, at 234-35.

142. Lorne Sossin, *The Criminalization and Administration of the Homeless: Notes on the Possibilities and Limits of Bureaucratic Engagement*, 22 N.Y.U. REV. L. & SOC. CHANGE 623, 638-39, 647 (1996).

143. See Foscarinis, *supra* note 43, at 25; see also Leckerman, *supra* note 141, at 545 (noting that, in twenty-nine major cities, the homeless population exceeds the number of shelter beds provided to them).

144. See *Fifth Ave. Presbyterian Church v. City of New York*, 293 F.3d 570, 574-76 (2d Cir. 2002) (holding that policy sweeps of homeless people sleeping on the steps of a church violated the church's First Amendment rights).

bodied adults who refused to work.¹⁴⁵ During the late nineteenth and twentieth centuries, police in American cities relied on vagrancy and loitering statutes to help ensure that homeless people remained in skid row areas. These practices were eventually limited by Supreme Court decisions invalidating local vagrancy¹⁴⁶ and loitering¹⁴⁷ statutes. The most recent wave of anti-homeless criminal sanctions, however, seeks to return to an approach of combating the social problems of poverty through criminal sanctions and to increase the discretion given to local law enforcement officials while trying to avoid potential constitutional problems of vagueness and overbreadth.¹⁴⁸

Cities claim they are merely protecting residents against crime, controlling threats to public health and sanitation, and trying to attract business and tourism.¹⁴⁹ New York City and San Francisco—municipalities with disproportionately large homeless populations—have lately taken particularly tough stances, seeking to rid their streets of homeless people through aggressive enforcement of “quality of life” measures.¹⁵⁰ Some localities, however, have pursued more constructive alternatives that seek to facilitate the intervention of social service providers on behalf of homeless people, rather than simply sweeping them from public view.¹⁵¹

Criminal sanctions against homeless people typically restrict their right to use certain public spaces or to solicit money. Public

145. See MICHAEL B. KATZ, *IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA* 14 (10th ed. 1996).

146. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 171 (1972) (finding that an overbroad vagrancy ordinance violates the Due Process Clause).

147. *Kolender v. Lawson*, 461 U.S. 352, 353 (1983) (holding a California law requiring people who loiter or wander the streets to provide “a credible and reliable” identification and to account for their presence when asked by a police officer void for vagueness and in violation of due process).

148. See Sossin, *supra* note 142, at 638-39, 642-43; see also Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: of Panhandlers, Skid Rows, and Public Space Zoning*, 105 YALE L.J. 1165, 1209 (1996) (criticizing Supreme Court decisions that “swept away the pre-existing legal code of the streets,” including the power of law enforcement to control the residents of skid row). But see Sossin, *supra* note 142, at 646 (“The criminalization of homelessness serves essentially cosmetic functions for municipalities.”).

149. Foscarinis, *supra* note 43, at 23-24; see Steven R. Paisner, *Compassion, Politics, and the Problems Lying on Our Sidewalks: A Legislative Approach for Cities to Address Homelessness*, 67 TEMP. L. REV. 1259, 1271-73 (1994) (summarizing the interests and concerns of a city and its inhabitants in the context of homelessness).

150. See, e.g., Evelyn Nieves, *In Famously Tolerant City, Impatience with Homeless*, N.Y. TIMES, Jan. 18, 2002, at A14 (describing the hard line approaches of New York, San Francisco, and other cities).

151. Foscarinis et al., *supra* note 141, at 17 (reviewing local legislation).

space restrictions include broad bans on sleeping in all public spaces or narrower prohibitions on sleeping in certain public areas at certain times.¹⁵² Some cities have focused on specific locations, like transportation systems.¹⁵³ In addition to passing new laws, cities have selectively enforced existing laws against loitering, littering, jaywalking, and similar offenses.¹⁵⁴

Cities have also tried to restrict the ability of homeless people to solicit funds from others in public.¹⁵⁵ Some cities have imposed broad bans on begging.¹⁵⁶ Others have adopted narrower time, place, and manner restrictions, such as prohibitions on subways, near automated teller machines, or at night.¹⁵⁷

Challenges to the law enforcement model have dominated much of homeless legal advocacy for over a decade.¹⁵⁸ Homeless people have attacked the constitutionality of these restrictions under the First Amendment,¹⁵⁹ the Fourth Amendment,¹⁶⁰ the Eighth

152. See, e.g., *Davison v. Tucson*, 924 F. Supp. 989, 991 (D. Ariz. 1996) (denying motion to enjoin a local ordinance outlawing sleeping in public); *Roulette v. City of Seattle*, 850 F. Supp. 1442, 1444 (W.D. Wash. 1994) (denying challenge to an ordinance prohibiting sitting or lying on a public sidewalk in certain parts of the city at certain times of day); *City of Pompano Beach v. Copalbo*, 455 So. 2d 468, 468-69 (Fla. Dist. Ct. App. 1984) (holding a prohibition against sleeping in automobile or other vehicle as unconstitutionally vague and overbroad); *Pollard v. State*, 687 S.W.2d 373, 373-74 (Tex. Ct. App. 1985) (holding defective a complaint based on a local prohibition against sleeping in a public space); see also Sossin, *supra* note 142, at 643.

153. See, e.g., *Streetwatch v. Nat'l R.R. Passenger Corp.*, 875 F. Supp. 1055, 1064-67 (S.D.N.Y. 1995) (granting preliminary injunction to prevent Amtrak from enforcing its policy of evicting homeless people from Penn Station without a justifiable basis); see also Ellickson, *supra* note 148, at 1198.

154. See, e.g., *Johnson v. City of Dallas*, 860 F. Supp. 344, 346 (N.D. Tex. 1994); see also Foscarinis, *supra* note 43, at 17-19 (summarizing the bans).

155. See Foscarinis, *supra* note 43, at 20-21 (summarizing the restrictions).

156. See, e.g., *Greater Cincinnati Coalition for the Homeless v. City of Cincinnati*, 56 F.3d 710, 713 (6th Cir. 1995) (challenging a local anti-begging ordinance); *Loper v. N.Y. City Transit Auth.*, 999 F.2d 699, 702-06 (2d Cir. 1993) (affirming district court's order striking down an anti-begging statute under the First Amendment); *L.A. Alliance for Survival v. City of Los Angeles*, 987 F. Supp. 819, 821 (C.D. Cal. 1997) (granting preliminary injunction preventing enforcement of local ordinance prohibiting aggressive solicitations by prohibiting solicitations in specified locations).

157. See, e.g., *Young v. N.Y. City Transit Auth.*, 903 F.2d 146, 147 (2d Cir. 1993) (challenging regulations prohibiting begging and panhandling in transit facilities); *Roulette*, 850 F. Supp. at 1442 (ordinance prohibiting aggressive begging).

158. See Foscarinis, *supra* note 118, at 339; Wright, *supra* note 40, at 182-98.

159. See, e.g., *Loper*, 999 F.2d at 704 (holding that begging on public streets is protected expression); *Young*, 903 F.2d at 146-47 (holding that begging on subways, unlike solicitation by organized charities, is not protected solicitation); *Blair v. Shanahan*, 775 F. Supp. 1315, 1317-18 (N.D. Cal. 1991) (granting declaratory judgment against anti-begging statute); see also *Fifth Avenue Presbyterian Church v. City of New York*, 293 F.3d 570, 572 (2d Cir. 2002) (upholding injunction against city's attempt to prevent homeless people from sleeping on a church's steps as violation of

Amendment,¹⁶¹ and the right to travel.¹⁶² For example, in *Pottinger v. City of Miami*,¹⁶³ the district court in the Southern District of Florida concluded that Miami's policy of arresting homeless people for engaging in essential daily activities, like eating and sleeping in public, violated the Eighth Amendment because homelessness is not a "choice," but rather is caused by a person's economic situation and/or physical or mental condition.¹⁶⁴ Other challenges, however, have proven less successful,¹⁶⁵ and the fact that the courts have uniformly rejected arguments that the homeless constitute a "suspect class" for equal protection purposes has blunted the potential strength of challenges to various measures targeting homeless people.¹⁶⁶

Critics complain that such rights-based litigation ignores a city's legitimate interest in keeping its public sidewalks spaces safe and

Free Exercise Clause); Helen Hershkoff & Adam S. Cohen, Commentary, *Begging to Differ: The First Amendment Right to Beg*, 104 HARV. L. REV. 896, 897 (1994) (arguing that begging is protected by the First Amendment).

160. See, e.g., *Love v. City of Chicago*, No. 96 C 0396, 1998 U.S. Dist. LEXIS 1386, *1-*2 (N.D. Ill. Feb. 5, 1998) (denying motion for a preliminary injunction challenging city practice of seizure and destruction of homeless people's property); *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1570 (S.D. Fla. 1992) (holding that Miami's policy of seizing and destroying homeless people's property or forcing them to abandon it at arrest sites violates the Fourth Amendment); *State v. Mooney*, 588 A.2d 145, 154 (Conn. 1991) (holding that a homeless individual had a reasonable expectation of privacy in the contents of his closed containers left under a bridge underpass).

161. See, e.g., *Pottinger*, 810 F. Supp. at 1561-65 (concluding that it constituted cruel and unusual punishment to punish people for being homeless since homelessness is an involuntary status); *Johnson v. City of Dallas*, 860 F. Supp. 344, 350 (N.D. Tex. 1994) (holding that punishing homeless people for sleeping in public when they had nowhere else to go punished involuntary status in violation of the Eighth Amendment).

162. See, e.g., *Johnson*, 860 F. Supp. at 353-55 (ordinance allegedly deterring people from moving to Dallas did not violate the right to travel); *Tobe v. City of Santa Ana*, 892 P.2d 1145, 1164-66 (Cal. 1995) (reversing decision that anti-homeless ordinance prohibiting camping in public impermissibly restricted the right to travel).

163. *Pottinger*, 810 F. Supp. at 1551.

164. See *id.* at 1565.

165. See *Joyce v. San Francisco*, 87 F.3d 1320, 1320 (9th Cir. 1996); *Young*, 903 F.2d at 164 (upholding transit authority's rules restricting begging on subway trains against a First Amendment challenge); *Whiting v. Town of Westerly*, 942 F.2d 18, 19 (1st Cir. 1987) (upholding ordinance prohibiting sleeping outdoors in public or in a motor vehicle in public); see also Daniels, *supra* note 125, at 709-15 (discussing cases showing courts "transition from sympathy to skepticism" of such arguments). But see Blasi, *supra* note 18, at 224 (rejecting the argument that by emphasizing external causes of homelessness and portraying homeless people as victims of larger structural forces, litigators adopted a self-destructive approach).

166. See Jennifer E. Watson, Note, *When No Place Is Home: Why the Homeless Deserve Suspect Classification*, 88 IOWA L. REV. 501, 502-03, 511 (2003).

clean.¹⁶⁷ Others say it diverts attention from more substantial long-term issues like affordable housing and declining relative income levels among the poor. Fighting to allow homeless people to camp in a public park or beg on a subway, they argue, does nothing to address the root causes of homelessness, but rather establishes, at best, only negative rights that prevent the government from punishing people for certain behavior without imposing any affirmative duties.¹⁶⁸

Moreover, while high-profile cases challenging restrictions on sleeping in a city's parks or begging on its streets certainly attract attention, not all the sentiments it generates are positive. The public's frustration—or "compassion fatigue"—with homeless people occupying public spaces has also gained respectability and force among commentators who approach the issue from a land management perspective and emphasize a city's need for orderly, aesthetically pleasing public spaces.¹⁶⁹

Yet, it is unfair to blame advocates for misdirecting efforts away from long-term solutions. Indeed, leading homeless civil rights groups themselves recognize that anti-criminalization lawsuits, while invaluable, do not create affordable housing or accessible services.¹⁷⁰ Litigation is initiated in response to the real and immediate needs of homeless clients and to the government's failure to implement and sustain an effective anti-poverty policy. When a homeless person is arrested for sleeping on a park bench, her lawyer's first response is not to address the underlying causes of homelessness, but to respond to a concrete injustice. Indeed, prohibitions on begging or sleeping in the park do not threaten some abstract notion of liberty, but rather strike at the ability of men and women to survive.¹⁷¹

167. See Ellickson, *supra* note 148, at 1227; Rob Teir, *Restoring Order in Urban Public Spaces*, 2 TEX. REV. L. & POL. 255, 257 (1998) (arguing that the claims of homeless rights advocates "invite the judiciary to usurp power from city councils and communities and, if successful, withdraw the vitality of residential and commercial areas").

168. See Daniels, *supra* note 125, at 729.

169. See Ellickson, *supra* note 148, at 1222-23 (arguing for the establishment of an informal zoning system that grants police officers significant discretion to preserve order on the streets and other public areas); see also Paisner, *supra* note 149, at 1304 (noting the problems homelessness creates for all residents of a city, not merely homeless people themselves).

170. ILLEGAL TO BE HOMELESS, *supra* note 141, at 73.

171. See Jeremy Waldron, *Homeless and the Issue of Freedom*, 39 UCLA L. REV. 295, 303, 320 (1991).

In short, litigation has played an important part in challenging aggressive, anti-homeless law enforcement policies. Decisions like *Pottinger* have helped overcome—or at least mitigate the effects of—attempts to use criminal law to deny society's poorest and most vulnerable members the basic means of survival.¹⁷² Legal advocacy also has fostered effective organizing approaches, raising awareness of and sympathy for homeless people (and helping mobilize public sentiment against anti-homeless ordinances).¹⁷³ While such litigation may establish only negative rights,¹⁷⁴ it has helped lead some governments to initiate programs designed to assist homeless people.¹⁷⁵ Thus, while resisting attempts to criminalize homelessness represents an integral part of homeless legal advocacy, it must be part of a broader strategy that attempts to address homelessness' root causes. The following Part outlines some elements of this broader strategy.

III. FUTURE DIRECTION OF HOMELESS LEGAL ADVOCACY

In light of the strengths and limitations of previous homeless legal advocacy, the question arises as to what role advocates can and should play in the future. This Part will outline possible new directions for homeless legal advocacy by building on past experiences and our current understanding of homelessness. First, it will consider the implications of the new poverty law scholarship of the last two decades for the development of legal advocacy models focused on homelessness. It will then describe the importance of tying homeless advocacy to more general anti-poverty efforts. It will next discuss the need to develop advocacy in more holistic settings where lawyers can work in tandem with other professionals, such as social workers, medical doctors, mental health professionals, and substance abuse counselors, to address homeless clients' various non-legal needs. While legal advocacy alone will never solve a problem as complex and deeply rooted as homelessness, it still has an important role to play.

172. See *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1580 (S.D. Fla. 1992); see *supra* notes 163-166 and accompanying text.

173. ILLEGAL TO BE HOMELESS, *supra* note 141, at 75, 83.

174. See *supra* note 168 and accompanying text.

175. See *Daniels*, *supra* note 125, at 729-31.

A. The New Poverty Law Scholarship and the Value of Homeless Legal Advocacy

The new poverty law scholarship that emerged in the wake of the Critical Legal Studies movement prompted a reexamination of the role lawyers play in addressing problems like homelessness.¹⁷⁶ This Section explores the central ideas of this movement and its relevance to homeless legal advocacy today. It then explains the continuing value of legal services to deliver tangible benefits that help people to escape homelessness and build public support for critical issues like affordable housing.

1. *Critical Legal Studies and the New Poverty Law Scholarship*

Traditional models of poverty lawyering have been challenged in the past two decades by the growth of the Critical Legal Studies ("CLS") movement,¹⁷⁷ and the new poverty law scholarship it helped engender.¹⁷⁸ CLS focused attention on the way in which law both reflects the interests of society's most powerful members and legitimates the subordination of less powerful groups. CLS attempted to expose the inherent indeterminacy of standards and values underpinning legal thought.¹⁷⁹ This delegitimization of traditional values and structures, characteristic of much postmodern thought,¹⁸⁰ carried significant implications for poverty lawyers, who were no longer seen as fighting a worthy battle to reform a redeemable system, but as somehow perpetuating inherent forms of domination and inequality. Some commentators contended that in establishing "rights" for their clients, public interest lawyers were winning only pyrrhic victories because the system it-

176. See *infra* notes 177-181 and accompanying text.

177. See generally Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983); see also Ruth Margaret Buchanan, *Context, Continuity, and Difference in Poverty Law Scholarship*, 48 U. MIAMI L. REV. 999, 1024-25 (1994) (noting the presence of critical perspectives in the "old" poverty lawyering of the 1960s, including an emphasis on client empowerment, a critique of lawyer-driven advocacy, and an emphasis on developing a community base).

178. For a description of the origins and development of the new poverty law scholarship, see Louise G. Trubek, *Lawyering for Poor People: Revisionist Scholarship and Practice*, 48 U. MIAMI L. REV. 983, 984-86 (1994) (describing, *inter alia*, the foundation of the Interuniversity Consortium on Poverty Law).

179. See Phyllis Goldfarb, *Beyond Cut Flowers: Developing a Clinical Perspective on Critical Legal Theory*, 43 HASTINGS L.J. 717, 722 (1992).

180. See generally Joel F. Handler, *Postmodernism, Protest, and the New Social Movements*, 26 LAW & SOC'Y REV. 697 (1992).

self ultimately reinforced alienation and powerlessness among the poor.¹⁸¹

CLS's basic principles have spawned several smaller, more-focused critical studies movements.¹⁸² Critical race theorists emphasize the way in which formal legal structures and norms perpetuate racial oppression and inequality.¹⁸³ Feminist legal theorists describe how law embodies a male perspective that suppresses the concerns of women, and advance a women's perspective on legal issues that is distinct from men's.¹⁸⁴ The new poverty law scholarship, or "critical lawyering" as it is sometimes known,¹⁸⁵ applies the principles of CLS to the practice of public interest law. The growing body of new poverty law scholarship contains significant challenges to and lessons for the future direction of homeless legal advocacy.

Proponents of critical lawyering challenge the traditional view of the attorney-client relationship. In the traditional conception of the relationship, the client's identity consists of a bundle of interests, and it is the lawyer's duty to manipulate the outside world to serve those interests, without ever substituting her own judgment as to what those interests are or should be.¹⁸⁶ Critical legal scholars argue instead that a client's interests are indeterminate and that the process of representation itself affects a client's understanding of those interests.¹⁸⁷ The lawyer, not unlike the scientist in quantum physics, does not remain a neutral, detached observer; just as the scientist alters the object of the experiment by observation, a lawyer alters a client's conception of her interests through the representation process.

181. Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369, 375 (1982-83).

182. See Gary Minda, *The Jurisprudential Movements of the 1980s*, 50 OHIO ST. L.J. 599, 617 (1989).

183. See, e.g., Greta McMorris, *Critical Race Theory, Cognitive Psychology, and the Social Meaning of Race: Why Individualism Will Not Solve Racism*, 67 UMKC L. REV. 695, 696-97 (1999).

184. See, e.g., Nancy Isenberg, *Laissez-Unfaire: Gender and the Political Manipulation of the Common Law in Antebellum America*, 37 TULSA L. REV. 929, 929-30 (2002).

185. See Ruth Buchanan & Louise G. Trubek, *Resistance and Possibilities: A Critical and Practical Look at Public Interest Lawyering*, 19 N.Y.U. REV. L. & SOC. CHANGE 687, 687 n.1 (1992) (describing the origins of the term "critical lawyering").

186. See William H. Simon, *Visions of Practice in Legal Thought*, 36 STAN. L. REV. 469, 470 (1984).

187. *Id.* at 470-71.

More radical critiques of conventional lawyering call for an entire restructuring of the attorney-client relationship.¹⁸⁸ Anthony V. Alfieri describes the attorney-client model of representation as a form of domination that inhibits the growth of genuine class-consciousness among poor people and blunts fertile possibilities for social change.¹⁸⁹ Others adopt a more moderate approach that seeks to incorporate progressive reforms into existing models of representation, emphasizing the need for greater dialogue between attorneys and their clients and for the establishment of a collaborative environment that empowers the client.¹⁹⁰

A focus on the primacy of a client's voice, rather than on the formal legal process, is central to much revisionist poverty law scholarship.¹⁹¹ In an influential article, Lucie E. White describes her relationship with her client, Mrs. G., who was challenging an alleged overpayment from welfare. Instead of following the attorney's advice to beg for mercy and say she spent the money on "necessities," thus excusing her for liability for the overpayment, Mrs. G. defiantly told the hearing officer that she had spent the money on Sunday shoes so her children could attend church.¹⁹²

White and others believe that formal legal rules, instead of empowering poor people, may help keep them silent.¹⁹³ Barbara Bedzek explains how poor, predominantly African-American defendants in Baltimore's housing court have been effectively silenced and excluded from meaningful participation in the process,

188. See, e.g., Anthony V. Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment*, 16 N.Y.U. REV. L. & SOC. CHANGE 659, 701 (1987-88).

189. See *id.* at 697-700.

190. See Buchanan & Trubek, *supra* note 185, at 703-04; Lucie E. White, *Collaborative Lawyering in the Field?: On Mapping the Paths from Rhetoric to Practice*, 1 CLINICAL L. REV. 157, 158 (1994).

191. See, e.g., GERALD P. LOPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* 48-51 (1992); Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants Voices in Legal Process*, 20 HOFSTRA L. REV. 533, 600 (1992) (stating "rights are not rights where they cannot be spoken or heard"); William H. Simon, *The Dark Secret of Progressive Lawyering: A Comment on Poverty Law Scholarship in the Post-Modern, Post-Regan Era*, 48 U. MIAMI L. REV. 1099, 1101 (1994) ("The new scholarship insists that overcoming the cultural distance that obscures the political sophistication and coping skills of poor clients is the first duty of the poverty lawyer."); Trubek, *supra* note 178, at 987; see generally Lucie E. White, *Subordination, Rhetorical Survival Skills and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990).

192. See White, *supra* note 191, at 21-32 (describing the story of Mrs. G.). Although Mrs. G. lost the hearing, the county withdrew its overpayment claim shortly after Mrs. G. had filed her appeal. *Id.* at 32.

193. See, e.g., *id.* at 35-37.

despite the existence of formal legal rights.¹⁹⁴ Bezdek describes the existence of two worlds in a single courtroom where poor, less well-educated tenants try to express themselves in the language of human decency—assuming they speak at all—while the court and landlords' agents communicate, with great effect, in the formal language of the law.¹⁹⁵

Traditional lawyering methods, these commentators argue, must be revised to take account of the client's voice in the course of representation; similarly, the attorney-client relationship must be infused with a spirit of mutual understanding and collaboration.¹⁹⁶ For example, welfare "fair hearings," which are generally provided by state statute and guaranteed by the federal Constitution,¹⁹⁷ can be viewed less as a forum for zealous advocacy than an opportunity for a client to tell her story¹⁹⁸—a privilege historically denied or limited for women and people of color.¹⁹⁹

Critical lawyering, however, is not without its detractors.²⁰⁰ Perhaps the most serious charge is that the movement provides little, if any, practical guidance to attorneys,²⁰¹ a similar criticism of CLS generally.²⁰² The vision of transforming and empowering poor people by altering the traditional dynamic of the attorney-client relationship may seem persuasive in an academic context, but, as critics point out, it ultimately has little relevance for the demands and realities of poverty law practice.²⁰³ Poverty lawyers not only have

194. See Bezdek, *supra* note 191, at 583-90.

195. See *id.* at 586-90. This difference can also be described as a clash between rule-oriented and relation-oriented accounts. See *id.* at 586-87.

196. See Buchanan & Trubek, *supra* note 185, at 703.

197. See, e.g., *Goldberg v. Kelley*, 397 U.S. 254, 262-63 (1970).

198. Cf. Lucie E. White, *Goldberg v. Kelley: On The Paradox of Lawyering for the Poor*, 56 BROOK. L. REV. 861, 862-63 (1990) (arguing that the spirit of landmark welfare rights decisions like *Goldberg v. Kelley* is for the fair hearing to be a genuinely participatory legal institution). Some commentators question whether fair hearings have led to more accurate decisions or increased the power of the poor, as *Goldberg* had intended. See, e.g., White, *supra* note 190, at 3 n.6.

199. See White, *supra* note 190, at 9-13.

200. See, e.g., Gary L. Blasi, *What's a Theory For?: Notes on Reconstructing Poverty Law Scholarship*, 48 U. MIAMI L. REV. 1063, 1087-89 (1994); Simon, *supra* note 191, at 1101 (criticizing "the preoccupation of the new poverty law scholars with professional domination and their premises about the nature of domination").

201. See White, *supra* note 190, at 159 (recognizing that advocates of collaborative lawyering "have offered little guidance about the day-to-day practices that their vision implies.").

202. See, e.g., Ed Sparer, *Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement*, 36 STAN. L. REV. 509, 554-55 (1984).

203. See Blasi, *supra* note 200, at 1087 ("Never has so much theory rested on so little practice.").

limited time and resources, but also are obliged—by professional ethics, if not, moral imperatives—to assist clients who, understandably, demand concrete results, such as immediate help maintaining public assistance benefits or avoiding eviction. If nothing else, the new poverty law scholarship has widened the gulf between theoreticians in academia and practitioners in legal services offices. While critical theorists rightly call attention to the danger of lawyers' excessive influence over poor clients, the idea that a lawyer would exercise no such influence and yet fulfill even the barest notions of professional competency, let alone true service to the client, is unrealistic.²⁰⁴

2. *Continuing Value of Homeless Legal Advocacy*

The needs of homeless individuals reveal the limitations of the new poverty law scholarship. Most people do not become homeless without at least some interaction with legal-bureaucratic institutions, and generally do not escape homelessness without successfully navigating those institutions, whether it be by obtaining housing assistance, public benefits, medical treatment, or counseling. The idea of some critical theorists, that lawyers exercise hegemony through the process of "asking"²⁰⁵ the client about her problem, does not accurately reflect the experience of providing legal representation to homeless individuals.

Homeless men and women generally do not walk into legal services offices and present a single, concrete issue around which to frame the first conversation. In fact, many homeless people are initially reached through outreach programs or walk-in clinics at places such as soup kitchens and food banks.²⁰⁶ A homeless client may present a range of legal issues (some of which may not be remediable), and a lawyer must engage in a process of "asking" to find out precisely what those issues are. Moreover, the idea of

204. See Simon, *supra* note 191, at 1102-03; cf. White, *supra* note 198, at 861-62 (describing, in the welfare fair hearing context, the tension advocates face between their duty of speaking for client and the value of their client being heard).

205. Cf. Simon, *supra* note 186, at 486-87.

206. See Susan M. Barrow et al., *Evaluating Outreach Services: Lessons from a Study of Five Programs*, NEW DIRECTIONS FOR MENTAL HEALTH SERVICES, Winter 1999, at 29 ("In a short time, outreach has moved from the periphery of the mental health services system to a prominent position as one of the essential elements of adequate community-based care."); Sally Erickson & Jamie Page, *To Dance with Grace: Outreach and Engagement to Persons on the Street*, in PRACTICAL LESSONS, *supra* note 38, at 6-7 to 6-8.

lawyering to raise political consciousness²⁰⁷ is problematic given the pressing material needs of homeless people. Community-based advocacy models²⁰⁸ may likewise prove more difficult to implement given homeless people's geographic dispersal and diversity.²⁰⁹ To the extent such advocacy proves feasible, the assertion of legal rights can interact with and complement attempts to develop a broader social movement.²¹⁰

Some principles of critical lawyering nevertheless provide fruitful avenues for future homeless advocacy. While the idea of re-orienting attorney-client relations along an axis of client empowerment presents certain challenges,²¹¹ it is important that attorneys pay close attention to what their homeless clients are saying and not simply assume what their interests are—an easy mistake to make when working with individuals as disempowered and socially stigmatized as homeless people. At an institutional level, lawyer-dominated agendas can be avoided by taking account of what studies show homeless people have defined as their more pressing needs in developing pragmatic priorities and approaches.²¹²

Ultimately, however, a lawyer must transform the narrative of a case into something the legal system can process, while making the system understandable to the client.²¹³ The challenge is to remain

207. See, e.g., Stephen Wexler, *Practicing Law For Poor People*, 79 YALE L.J. 1049, 1053 (1970) ("Poverty will not be stopped by people who are not poor. . . . The lawyer who wants to serve poor people must put his skills to the task of helping poor people organize themselves."); cf. Martha Minow, *Political Lawyering: An Introduction*, 31 HARV. C.R.-C.L. L. REV. 287, 289 (1996) (describing the broad mobilization in the labor and civil rights movements).

208. Raymond H. Brescia et al., *Who's in Charge, Anyway? A Proposal for Community-Based Legal Services*, 25 FORDHAM URB. L.J. 831, 846-48 (1998); Comment, *The New Public Interest Lawyers*, 79 YALE L.J. 1069, 1133 (1970).

209. See Robert A. Solomon, *Representing the Poor and Homeless: A Community-Based Approach*, 19 ST. LOUIS U. PUB. L. REV. 475, 480 (2000). Community-based efforts may, however, play an important role in addressing housing and other issues that prevent homelessness, even though conflicts may arise between individual advocacy and the interests of the community. See *id.* at 481.

210. See Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589, 610-12 (1986).

211. See *supra* notes 206-207 and accompanying text.

212. Cf. Dennis P. Culhane et al., *Making Homelessness Programs Accountable to Consumers, Funders, and the Public*, in PRACTICAL LESSONS, *supra* note 38, at 4-4.

213. See LOPEZ, *supra* note 191, at 43 (suggesting that lawyers must be bicultural, "creating both a meaning for the legal culture out of the situation people are living, and a meaning for people's practices out of the legal culture"); cf. Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 73 (1988) (suggesting that deciding how and to what extent she should conform to the will of the client to fit the relevant legal processes).

true to the client's narrative while providing a high caliber of legal services. If a client wants to stand up at a hearing to tell her story and will feel more empowered as a result,²¹⁴ the lawyer must recognize and honor that wish. On the other hand, the lawyer must counsel the client about the possible consequences and be careful not to foist her own theories about empowerment upon a client who may ultimately be less interested in telling her story than in gaining a tangible benefit. At the same time, even in ordinary cases, a client's story has an inherent political message—for example, the state's failure to provide sufficient child care assistance while imposing strict work requirements on single mothers receiving welfare benefits—that can be drawn out and amplified through the process of individual representation.²¹⁵

B. Strengthening Links between Homelessness and Poverty Law Advocacy

A frequent tactic of homeless rights lawyers has been to define homeless people as a separate, unique class that deserves society's utmost sympathy and support. While millions of other Americans may be poor, the argument goes, only homeless people are so destitute they must live on the streets. This approach helped bring important benefits, such as the creation of a vast network of shelter systems, the establishment of homeless assistance programs in welfare bureaucracies that provide emergency housing grants, and increased public recognition of the overall problem. It has, however, also contributed to a degree of separation between homeless rights advocacy and poverty law practice. While the two are closely related—many public benefits or housing court cases are potentially homeless prevention cases—there tends to be a conceptual split between the poor or working poor and the homeless. In fact, many legal issues confronting homeless people overlap with those confronting other poor people. It is important that, where appropriate, homeless rights advocates strengthen these connections because it will help homeless clients and, more broadly, because it will reinforce that homelessness is—ultimately—a problem of ex-

214. See *supra* notes 204-205 and accompanying text.

215. Cf. Gabel & Harris, *supra* note 181, at 396 (suggesting ways for lawyers to politicize typically non-political cases). For an extreme expression of this view, see, for example, Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2429 (1989), describing the power of stories as superior to that of litigation in producing social change. For a much more limited view of the power of stories, see Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 826 (1993).

treme poverty. Strengthening this connection is particularly important in the wake of welfare reform and other changes adversely affecting poor people's legal rights and the social safety net in general.

This Section explores the possibility of linking homelessness to more general anti-poverty advocacy. The discussion below is not intended to be exhaustive, but rather represents some important themes around which advocates can organize and direct future efforts.

1. *Public Benefits Advocacy*

Studies have documented the connection between increases in homelessness and the decline in the availability and relative amount of public assistance.²¹⁶ Lawyers have previously targeted systemic problems of welfare administration in cities with large homeless populations such as New York and Los Angeles. They have also helped win greater shelter or housing supplements to welfare grants.²¹⁷

Yet, there remain significant obstacles for homeless people in gaining access to benefit programs such as welfare, SSI, and food stamps. Welfare reform created strict work requirements and caseload reduction incentives that make it more difficult for homeless people to obtain benefits. Despite the fact that many homeless people remain eligible for SSI and food stamps, participation rates in these programs remain relatively low.²¹⁸ In addition to issues of substantive eligibility, homeless people confront residency, address, and documentation requirements that may preclude them from obtaining benefits.²¹⁹

a. *Welfare*

The 1996 welfare reform act has adversely impacted homeless people and increased the need for legal advocacy. In general, the act has limited eligibility, imposed strict work requirements, and

216. See *supra* notes 87-93 and accompanying text; see also BURT ET AL., *supra* note 3, at 232.

217. See Gary L. Blasi, *Litigation Strategies for Addressing Bureaucratic Disentitlement*, 16 N.Y.U. REV. L. & SOC. CHANGE 591, 598-99 (1987-88).

218. See Jeremy Rosen et al., *Food Stamp and SSI Benefits: Removing Access Barriers for Homeless People*, 34 CLEARINGHOUSE REV. 679, 679 (2001) (citing survey that only eleven percent of homeless persons received SSI benefits and only thirty-seven percent received food stamps).

219. See *id.*

placed a mandatory five-year lifetime cap on receipt of benefits.²²⁰ It has also increased the danger of “bureaucratic disentanglement”²²¹—the various extralegal administrative hurdles that discourage people from applying for or that delay receipt of benefits²²²—by allowing states and localities (and thus front-line caseworkers) greater discretion to promote employment over financial assistance or to discourage people from even applying for benefits.²²³ Stricter work requirements,²²⁴ time limits on receipt of benefits,²²⁵ and the ability to sanction recipients²²⁶ have dramatically expanded the power of caseworkers and decreased the power of recipients in dealing with welfare bureaucracies.²²⁷

Homeless people have traditionally been underrepresented among the pool of welfare recipients despite their unquestioned financial eligibility,²²⁸ and are particularly vulnerable to bureaucratic disentanglement and “churning,” the practice of rapid administrative closure of welfare cases for reasons such as the recipient’s failure to comply with a request for verification of eligibility or to

220. 42 U.S.C. §§ 607-608 (2001).

221. See Michael Lipsky, *Bureaucratic Disentanglement in Social Welfare Programs*, 58 SOC. SERV. REV. 3, 3 (1984) (“In bureaucratic disentanglement, obligations to social welfare beneficiaries are reduced and circumscribed through largely obscure ‘bureaucratic’ actions and inactions of public authorities . . .”).

222. See Blasi, *supra* note 217, at 594-95 (describing the devastating impact of bureaucratic disentanglement on homeless applicants in Los Angeles County); see also Reynolds v. Giuliani, 35 F. Supp. 2d 331, 346-47 (S.D.N.Y. 1999).

223. See Alice Bers, Recent Development, *Reforming Welfare After Welfare Reform*: Reynolds v. Giuliani, 36 HARV. C.R.-C.L. L. REV. 571, 599 (2001) (“With PRWORA’s encouragement of discretionary welfare administration, the potential for abuse of that discretion is concomitantly higher; this warrants courts scrutinizing the actions of local government institutions more closely to ensure that poor people’s rights are not violated.”); Diller, *supra* note 98, at 1150-52.

224. See Diller, *supra* note 98, at 1148-49 (“Work requirements call for judgments about whether the client can work, what activities should be required, whether the client has access to suitable child care, whether a recipient was justified in quitting a job, and whether the client has good excuses for missing appointments or assignments.”).

225. See *id.* at 1150-51 (noting that while time limits themselves may be fixed, caseworkers exercise discretion in manipulating information about time limits and in deciding which recipients may qualify for the limited exceptions from those limits).

226. See *id.* at 1157-60 (discussing the power of states to administer a growing array of sanctions, including those for violations of work requirements).

227. See *id.* at 1152-56 (citing, for example, the role of caseworkers in carrying out “diversion” policies that attempt to dissuade potentially eligible individuals from applying for benefits, such as requirements that applicants engage in job search programs before receiving benefits).

228. See Susan D. Bennett, “No Relief But Upon the Terms of Coming into the House,”—*Controlled Spaces, Invisible Disentitlements, and Homelessness in an Urban Shelter System*, 104 YALE L.J. 2157, 2180-82 (1995).

make a scheduled appointment with her caseworker.²²⁹ The fact that many homeless people suffer from disabilities often creates further obstacles to obtaining and maintaining welfare benefits.²³⁰ The restrictions imposed by the 1996 act have increased the need for advocates to challenge abuses,²³¹ as many have already done.²³²

b. SSI

Because federal welfare programs have traditionally been limited to families with children, single adults have been forced to rely on state general assistance programs that provide significantly lower benefit rates, if they exist at all. Single adults still make up a majority of the homeless population, though the proportion of families with children has been rising steadily.²³³ Many homeless single adults suffer from mental illness. For this population, it is important, where possible, to obtain benefits under the SSI program,²³⁴ the federal means-tested program for low-income persons who are elderly (sixty-five and older), blind, or disabled.²³⁵ Indeed,

229. *See id.* at 2181 (describing a study in New York City finding that seventy-five percent of the clients studied had benefits terminated within the first six months they had received them).

230. New York City's failure to provide reasonable mental accommodations to its welfare program for people with disabilities is now the subject of a pending complaint filed by several legal service organizations with the United States Department of Health and Human Services, Office of Civil Rights. *See* Nina Bernstein, *Complaint Accuses New York City of Bias Against Mentally Ill*, N.Y. TIMES, Apr. 3, 2002, at B2.

231. *See, e.g.*, Peter Edelman, *Responding to the Wake-Up Call: A New Agenda for Poverty Lawyers*, 24 N.Y.U. REV. L. & SOC. CHANGE 547, 551-54 (1998) (discussing the "cornucopia of advocacy challenges and opportunities" including the availability of child care, health coverage, and transportation).

232. *See, e.g.*, *Saenz v. Roe*, 526 U.S. 489, 507-08 (1999) (holding that the PRWORA's authorization of a durational residency requirement for the receipt of welfare benefits did not resuscitate the constitutionality of a state statute allowing for such a requirement); *Reynolds v. Giuliani*, 35 F. Supp. 2d 331, 347 (S.D.N.Y. 1999) (enjoining New York City from deterring plaintiffs from applying for emergency food stamps, Medicaid, and cash assistance at job centers); *Sojourner A. v. N.J. Dep't of Human Servs.*, 794 A.2d 822, 824 (N.J. Super. Ct. App. Div.), *certification granted by*, 803 A.2d 1165 (N.J. 2002) (challenging the constitutionality of a state statute capping welfare benefits for women who have additional children); *Davila v. Turner*, No. 96-407163 (N.Y. Sup. Ct. Apr. 15, 1999), *reprinted in* N.Y. L.J., Apr. 16, 1999, at 26 (holding that the city violated the law by assigning virtually all welfare recipients to workfare without consideration of other qualifying activities such as education and training); *see also* Bers, *supra* note 223, at 606 (noting that litigation can still achieve important institutional changes even in the current discretionary welfare regime). For a more complete description of the *Reynolds* litigation, *see id.*

233. *See supra* text accompanying notes 41-42.

234. Social Security Amendments of 1972, Pub. L. No. 92-603, 86 Stat. 1329 (1972) (codified as amended in scattered sections of 42 U.S.C.).

235. 42 U.S.C. § 1382c(a)(1)(A) (2002).

for non-elderly, mentally ill single adults—who are ineligible for TANF funds and unable to work—accessing SSI represents perhaps the best chance to gain the financial means to escape homelessness. Many homeless people meet the Social Security disability standard²³⁶ because they have chronic health problems, which being homeless often exacerbates.²³⁷ Yet, many eligible homeless people are not receiving SSI benefits,²³⁸ as the Social Security Administration (“SSA”) itself has recognized.²³⁹ The problem may partly be explained by the lack of information about SSI, the lack of assistance in filing for benefits, and the length and complexity of the application process itself.²⁴⁰ The SSA, however, has made some attempt to increase outreach efforts aimed at homeless people.²⁴¹

Given the often inappropriate denial of disability claims by homeless people,²⁴² and the high rates of reversal at the administrative hearing level where such denials are challenged,²⁴³ legal advocacy can make a significant difference.²⁴⁴ This is particularly true for individuals who suffer from alcohol or substance abuse in light of a 1997 change to eligibility criteria that prevents receipt of SSI benefits if drug or alcohol “is a contributing factor material to

236. An adult is disabled for purposes of SSI if she cannot “engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months.” *Id.* § 1382c(a)(3)(A).

237. See, e.g., Leonard Adler, Student Research, *SOS for SSI: The Unfulfilled Promise to Homeless Americans*, 1 GEO. J. ON FIGHTING POVERTY 304, 308-09 (1994). Homeless individuals with a sufficient and recent enough history of employment may be eligible for Social Security disability benefits (“SSD”), a non-means tested employment insurance program that can pay significantly higher benefit rates than SSI, depending on the individual’s employment history. See 42 U.S.C. §§ 401(b), 423.

238. See *id.* at 307 (“Homeless people are more likely than average Americans to have characteristics that allow them to qualify for SSI, yet they are vastly underrepresented in the program.”); Michael Diehl, *Screening Out Worthy Social Security Disability Claimants and its Effect on Homelessness*, 45 U. MIAMI L. REV. 617, 617-18 (1990-91).

239. See Social Security Administration Supplemental Security Income Modernization Project, 57 Fed. Reg. 40,732, 40,779 (Sept. 4, 1992), cited in Adler, *supra* note 237, at 309.

240. See Adler, *supra* note 237, at 311-13.

241. See *id.* at 312.

242. See *id.* at 313.

243. See *id.* (citing a sixty percent reversal rate by administrative law judges).

244. See, e.g., Richard Cullison, *SSI Applicants Shouldn’t Have to Seek Lawyers’ Help*, LEXINGTON-HERALD LEADER, Sept. 23, 2002, at A8 (stressing the importance of advocacy because the Social Security Administration frequently wrongfully denies benefits).

the determination of disability,”²⁴⁵ and thus face greater difficulty establishing disability.

Further advocacy is also needed around regulations that directly impact homeless people, such as those governing residence in public institutions such as homeless shelters, jails, and hospitals.²⁴⁶ Regulations preclude receipt of SSI benefits by individuals who remain in public homeless shelters for six months within a nine-month period.²⁴⁷ Even though the regulations require that an individual remain in the shelter for the entire month for that month to count in terms of the restriction,²⁴⁸ SSA often incorrectly counts months against recipients in which they were absent for part of that month. Also, SSI benefits are suspended when an individual enters other public institutions, such as jails. Under the pre-release program, individuals in such public institutions may either file new SSI applications or seek to reactivate previously open cases prior to their release so that, if approved, they will receive benefits upon release.²⁴⁹ Many public institutions, however, have not complied with the pre-release program.²⁵⁰

While SSI benefit rates may, in many cases, still be insufficient for homeless people to obtain permanent housing at market rates,²⁵¹ they provide a critical source of income, particularly for single adults²⁵² who must otherwise rely solely on meager state general assistance funds to survive. Indeed, obtaining SSI benefits may open the door to new housing opportunities, including subsidized housing programs run by not-for-profit organizations in the community.

c. Food Stamps

Hunger and malnutrition are important problems confronting homeless people, particularly those who do not eat at shelters or soup kitchens.²⁵³ Participation rates for the homeless population in

245. Supplemental Security Income for the Aged, Blind, and Disabled, 20 C.F.R. § 416.214 (2000); Rosen et al., *supra* note 218, at 680 (noting views of advocates that this change has decreased the number of homeless SSI recipients); Watson, *supra* note 113, at 375.

246. *See generally* 20 C.F.R. § 416.211.

247. *Id.* §§ 416.201, 416.211.

248. *Id.* § 416.211(a)(2).

249. *Id.* § 416.211(a).

250. *See* Rosen et al., *supra* note 218, at 687.

251. *See* Adler, *supra* note 237, at 311.

252. *See* BURT ET AL., *supra* note 3, at 119.

253. *See id.* at 80 (noting that homeless people are more likely to experience hunger and food insecurity than any other group); Monica A. Fennell, *Hunger and*

the federal food stamp program is even lower than that for low-income people generally, even though almost all homeless people are eligible.²⁵⁴ The barriers to homeless people's participation in the food stamp program include the lack of information about the program and its procedures and the lack of enforcement of favorable statutory and regulatory measures.²⁵⁵ Homeless people often do not have the documents necessary to verify eligibility for food stamps and have difficulty obtaining or replacing documents.²⁵⁶ Meanwhile, agencies frequently fail to adhere to requirements that they assist individuals in obtaining the necessary documents rather than simply denying their claim.²⁵⁷

While the entitlement to food stamps survived the 1996 welfare reform act,²⁵⁸ eligibility issues have grown more thorny in places where food stamps are administered through local welfare centers because the act has increased the discretion of caseworkers and the use of diversionary practices.²⁵⁹ One local practice, for example, has allegedly misinformed people that they are no longer entitled to food stamps once they receive SSI benefits.²⁶⁰ In addition, able-bodied food stamps recipients between the ages of eighteen and sixty, and without dependent children, must comply with strict work requirements to receive benefits.²⁶¹ Furthermore, the 1996 welfare reform act eliminated automatic eligibility for expedited

Homelessness: Why the Homeless Need Food Stamp Advocacy and How to Pay for It, 21 FORDHAM URB. L.J. 127, 131-32 (1993).

254. Fennell, *supra* note 253, at 132-33; see Florence Wagman Roisman, *The Lawyer as Abolitionist: Ending Homelessness and Poverty in Our Time*, 19 ST. LOUIS U. PUB. L. REV. 237, 248 n.53 (2000) (citing a recent study reporting that only thirty-seven percent of the people who use homeless assistance programs receive food stamps); Tusan, *supra* note 67, at 1196 (noting that a majority of eligible homeless families did not receive food stamps or supplemental benefits offered to parents with infants).

255. See Fennell, *supra* note 253, at 139; see also Bennett, *supra* note 228, at 2176 (describing the obstacles homeless families faced in applying for food stamps and other benefits in Washington, D.C.).

256. See Rosen et al., *supra* note 218, at 689.

257. See 7 C.F.R. § 273.2(c)(5) (2003).

258. See 7 U.S.C. § 2011 *et seq.* (2003) (setting forth the aims, provisions, and eligibility requirements of the federal food stamp program).

259. See *Roberson v. Giuliani*, 99 Civ. 10900, 2000 WL 760300, at *1 (S.D.N.Y. June 12, 2000) (addressing the issue of whether joint applicants for food stamps and public assistance may be denied food stamps for failure to comply with heightened public assistance verification rules requiring multiple interviews and a mandatory home visit in most cases). See generally *supra* notes 220-227 and accompanying text.

260. See Nina Bernstein, *Suit to Seek Food Stamps for Thousands Wrongly Denied Them*, N.Y. TIMES, Mar. 31, 2002, at A29 (describing class action suit against New York City to challenge this practice).

261. See 7 U.S.C. § 2015(d)(1)(A).

food stamps—an important provision to assist individuals waiting for their applications to be processed.²⁶²

Lawyers, therefore, can play a critical role in assisting homeless people enforce their rights under the food stamp program and navigate additional barriers imposed by the 1996 welfare reform act. They can, for example, help homeless clients prevent unlawful denials of food stamp applications for failure to provide verifying documentation,²⁶³ assist them on budgeting issues to maximize their food stamp award,²⁶⁴ and help them demonstrate eligibility for the exemptions from the work requirements for single able-bodied adults.²⁶⁵

2. Eviction Defense

Another critical part of combating homelessness is eviction prevention advocacy in specialized housing (or landlord-tenant) courts in cities across the country. These specialized housing courts handle a high volume of cases.²⁶⁶ The role of eviction prevention programs has become even more important given the shortage of affordable housing, which reduces the possibility that a tenant evicted from her home can find another place to live other than a shelter or the street.²⁶⁷ While almost all landlords have legal representation in housing court, the vast majority of tenants do not.²⁶⁸ Absent representation, the various procedural protections in urban housing codes often hinder tenants, trapping them in a web of complex rules, rather than safeguarding their rights.²⁶⁹ Represented tenants are much less likely to be evicted than those without counsel.²⁷⁰ Projects to increase access to legal representation have

262. See 7 C.F.R. § 273.2(a) (setting forth criteria households must meet to be entitled to expedited food stamps, which require the agency to process the application “promptly” and provide expedited food stamps “to households in immediate need”).

263. See *supra* notes 256-257 and accompanying text.

264. See Rosen et al., *supra* note 218, at 690-91 (summarizing regulations regarding shelter allowances).

265. *Id.* at 693-94 (discussing various exemptions).

266. See, e.g., Paula Galowitz, *The Housing Court's Role in Maintaining Affordable Housing*, in HOUSING AND COMMUNITY DEVELOPMENT, *supra* note 72, at 180 (describing the New York City Housing Court).

267. Andrew Scherer, *Gideon's Shelter: The Need to Recognize a Right to Counsel for Indigent Defendants in Eviction Proceedings*, 23 HARV. C.R.-C.L. L. REV. 557, 562 (1988); see Tusan, *supra* note 67, at 1214 (noting that evictions represent the central immediate cause of homelessness).

268. See Galowitz, *supra* note 266, at 184.

269. See Scherer, *supra* note 267, at 558-59.

270. See Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35

proven extremely effective in reducing eviction rates and underscore the importance of a level playing field in housing court.²⁷¹ Unfortunately, funding to legal services organizations for eviction prevention continues to decline.²⁷² While legal advocacy cannot remedy the declining income levels and rising housing costs that underlie many evictions, it can still help prevent many low-income people from becoming homeless.²⁷³

3. *Minimizing the Negative Effects of Incarceration*

It is also important for lawyers to focus advocacy efforts on developing trends such as the link between homelessness and incarceration. A recent federal study determined that over ten percent of inmates in state prisons in the country (almost 200,000 people) had been homeless in the year before their arrest.²⁷⁴ Homeless service providers generally agree that the number of homeless single adults who were previously incarcerated rose significantly during the 1990s.²⁷⁵ Individuals with criminal records confront additional obstacles in obtaining housing, employment, and public benefits. The criminal justice system thus pushes homeless people further outside mainstream society, often for low-level drug crimes or quality-of-life offenses.²⁷⁶

Some innovative programs seek to address this problem by facilitating connections between external community providers and the

LAW & SOC'Y REV. 419, 419 (2001) (noting that a study of the New York City Housing Court revealed that "only twenty-two percent of represented tenants had final judgments against them, compared with fifty-one percent of tenants without legal representation"). New York City's Housing Court handles approximately 300,000 cases per year and issues almost 100,000 warrants of eviction. *Id.*

271. See, e.g., Galowitz, *supra* note 266, at 189.

272. See Scherer, *supra* note 267, at 560.

273. In addition to eviction prevention, advocates should continue to attempt to work on larger efforts to preserve affordable housing. See, e.g., Ammann, *supra* note 71, at 314-15 (describing efforts of advocates on a range of efforts to preserve affordable housing).

274. COALITION FOR THE HOMELESS: HOUSING A GROWING CITY: NEW YORK'S BUST IN BOOM TIMES 90 [hereinafter HOUSING A GROWING CITY] (citing a 1998 U.S. Department of Justice report); see also BURT ET AL., *supra* note 3, at 220, 231.

275. See HOUSING A GROWING CITY, *supra* note 274, at 91.

276. See Stephen R. Binder, *The Homeless Court Program: Taking the Court to the Streets*, 65 FED. PROBATION, June 2001, at 15; see also KUSMER, *supra* note 10, at 246 (noting that, during the 1990s, cities began passing "quality of life" ordinances that permitted police to arrest homeless people for minor misdemeanors such as sleeping or sitting on a sidewalk).

criminal justice system.²⁷⁷ These programs are an important step given the relatively high percentage of substance abuse and mental illness among this segment of the homeless population.²⁷⁸ Also, litigation has challenged the adequacy of discharge planning for mentally ill inmates released from hospitals²⁷⁹ and prisons.²⁸⁰ Evidence suggests that linking these inmates with social services and housing assistance upon release is cost-effective.²⁸¹ Other possible targets for legal advocacy are the lengthy disqualifications for federal housing programs²⁸² that ensnare not only those convicted of serious crimes, but also those convicted of minor offenses.²⁸³ In addition, advocates should focus more on increasing soon-to-be released inmates' access to public benefit programs.²⁸⁴ Finally, there should be an expansion of programs that seek to help homeless people resolve outstanding criminal court cases for less serious of-

277. Alissa Riker & Ursula Castellano, *The Homeless Pretrial Release Project: An Innovative Pretrial Release Option*, FED. PROB., June 2001, at 12 (describing the Homeless Release Project in San Francisco).

278. *See id.* at 10 (noting that approximately eighty-five percent of the homeless release project's clients have substance abuse issues and that about fifty percent have been diagnosed with a co-occurring mental illness).

279. *See, e.g.,* Watson, *supra* note 113, at 377-82 (discussing litigation to enforce adequate discharge planning from hospitals and psychiatric institutions).

280. *See* Brad H. v. City of New York, 712 N.Y.S.2d 336, 336, 341 (Sup. Ct. 2000) (granting preliminary injunction to a class of prisoners who contended that they were not provided with discharge plans for mental health treatment upon their release in violation of state law).

281. *See* Robert Kolker, *Quality-of-Life Control*, N.Y. MAG., Jan. 14, 2002, available at <http://www.newyorkmetro.com/nymetro/news/politics/newyork/features/5581> (last visited Mar. 15, 2003).

282. *See supra* notes 109-110 and accompanying text. At the same time, federal law authorizes local public housing authorities to consider a range of mitigating evidence showing a tenant's suitability for federally subsidized housing notwithstanding a prior conviction. *See, e.g.,* 24 C.F.R. § 960.203(d) ("In the event of the receipt of unfavorable information with respect to the applicant, consideration shall be given to the time, nature, and extent of the applicant's conduct (including the seriousness of the offense)."); *id.* § 960.203(d)(1) (authorizing local public housing authorities to consider "factors which might indicate a reasonable probability of favorable future conduct"). Furthermore, determinations of ineligibility by a housing authority may be challenged by requesting an administrative hearing. *See, e.g.,* 42 U.S.C. § 1437d(c)(2); 24 C.F.R. § 982.554.

283. *See* Ammann, *supra* note 71, at 240.

284. *See, e.g.,* SOCIAL SECURITY ADMIN., PROGRAM OPERATION MANUAL SYSTEM SI 00520.900 *et seq.* (describing prerelease procedures to provide a way for potentially eligible individuals to apply for disability benefits under the Social Security Administration's Supplemental Security Income program prior to their release from public institutions such as prisons), available at <http://policy.ssa.gov/poms.nsf/poms> (last visited Mar. 15, 2003).

fenses, in order to avoid civil disqualifications for critical needs like housing and employment.²⁸⁵

C. Targeting Specific Homeless Populations

Another effective approach to homeless advocacy focuses on specific homeless populations. While poverty is the underlying cause of homelessness among all groups, different populations have different needs and would benefit from more targeted types of advocacy. This Section focuses on two postential gorups: families; and the elderly.²⁸⁶

1. Homeless Families

More programs should focus on homeless families—the fastest growing segment of the homeless population. Domestic violence is an underlying cause of homelessness among many families, forcing women to leave their homes even though they may have no place else to go. Approximately one-half of homeless women and children are victims of domestic violence.²⁸⁷ Advocacy may involve obtaining orders of protection and helping domestic violence victims navigate legal barriers to affordable housing. Homeless families also face family law issues, including the potential loss of children to foster care.²⁸⁸

Education represents another important issue for homeless families. Most homeless children do not attend school regularly, are forced to shuttle between different schools in a given academic year, attain lower education achievement standards, and have more emotional and behavior problems than other school children.²⁸⁹ As a result, a right to education for homeless children and youth was incorporated into the McKinney-Vento Homeless Education Assistance Improvement Act, guaranteeing homeless children and youth equal access to the same free, appropriate public education as other children and youth.²⁹⁰ The act orders that state

285. See Binder, *supra* note 276, at 15 (describing a homeless court program run outside the courthouse).

286. Other target homeless populations might include, for example, people with HIV/AIDS. See, e.g., Patti Phillips, *Adding Insult to Injury: The Lack of Medically-Appropriate Housing for the Homeless HIV-III*, 45 U. MIAMI L. REV. 567, 571 (1990-91) (describing the importance of legal advocacy for homeless people with HIV).

287. See Gretchen P. Mullins, *The Battered Woman and Homelessness*, 3 J.L. & POL'Y 237, 244 (1994); Tusan, *supra* note 67, at 1187.

288. Rosenheck et al., *supra* note 38, at 2-11.

289. See Shelia O'Leary, *Student Research: Hot Topics in Education, Educating Homeless Children*, 8 GEO. J. ON POVERTY L. & POL'Y 513, 513-14 (2001).

290. 42 U.S.C. § 11431 (2002).

educational agencies ensure that homeless children have the same right to public education as other children, and explicitly requires states to review and, if necessary, revise any laws or rules that may act as a barrier to the educational success of homeless children,²⁹¹ such as residency and school records requirements and lack of transportation.²⁹² The No Child Left Behind Act of 2001²⁹³ reauthorized the McKinney-Vento Act and strengthened various provisions, for example, by requiring school districts to keep children who are homeless in the same school they attended when permanently housed or the school they last attended, if that is the choice of the parent or guardian, for the duration of their homelessness or until the end of the academic year, if they become housed.²⁹⁴ Inadequate funding and noncompliance with statutory requirements, however, have previously undercut the McKinney-Vento Act's goals.²⁹⁵ Lawyers can seek greater enforcement of the McKinney-Vento Act through public education to educate homeless parents and children about their rights,²⁹⁶ direct legal services providing advocacy at the local school level,²⁹⁷ litigation challenging broader policies,²⁹⁸ and legislative advocacy to promote statutory and regulatory laws at the state and local level to help guarantee the rights of homeless children and youth.²⁹⁹

2. Elderly Homeless

The elderly represent another growing segment of the homeless population,³⁰⁰ one that does not generally receive much publicity but would greatly benefit from increased advocacy. Although the

291. *Id.*

292. Deborah M. Thompson, *Breaking the Cycle of Poverty: Models of Legal Advocacy to Implement the Educational Promise of the McKinney Act for Homeless Children and Youth*, 31 CREIGHTON L. REV. 1209, 1222-24 (1998).

293. Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified at 20 U.S.C. § 6301 *et seq.* (2003)).

294. See 42 U.S.C. § 11432(g)(3); see also Nat'l Coalition for the Homeless, President Bush Signs Education Reform Bill (Jan. 8, 2002) (describing improvements to the McKinney-Vento Act with the most recent amendments), at <http://www.nationalhomeless.org/edannouncement.html> (last visited Mar. 15, 2003).

295. Thompson, *supra* note 292, at 1213-14.

296. *Id.* at 1234-35.

297. *Id.* at 1235-36.

298. See, e.g., Joe Surkiewicz, *Public Justice Center Sues Montgomery County, Md., Over Homeless Students' Rights*, DAILY REC., May 20, 2002, at B1 (challenging county's policy refusing to permit students to attend their school of origin when they temporarily move outside their school district due to homelessness).

299. Thompson, *supra* note 292, at 1236-38.

300. See *supra* note 49 and accompanying text.

definition of “elderly” varies, there is a growing consensus that individuals fifty years of age and older should be included in the population of elderly homeless individuals. Homeless persons aged fifty to sixty-five may resemble older individuals due to their physical health, which is exacerbated by poor nutrition and severe living conditions.³⁰¹

The increase in homelessness among elderly persons is primarily due to the declining availability of affordable housing and growing poverty among certain segments of this age group.³⁰² A 1998 HUD study found that, of the 12.5 million persons in households identified as having “worst case housing needs,” 1.5 million were elderly people.³⁰³ Although Social Security benefits have significantly reduced poverty among the elderly,³⁰⁴ elderly persons are more likely than nonelderly persons to have incomes just over the poverty line, leaving them less money to spend on basic necessities, including housing.³⁰⁵

Also, elderly people generally are entitled to receive Social Security retirement benefits only if they (or their spouses) have worked the required forty quarters.³⁰⁶ While those sixty-five and over who do not qualify for Social Security because they lack the necessary work credits are eligible for SSI benefits (assuming they meet the income, resource, and other eligibility requirements), those under sixty-five only receive SSI if they prove they are disabled or blind.³⁰⁷ Moreover, SSI benefits, which primarily consist of a federal portion and in some states, a supplement,³⁰⁸ can be insufficient to find housing.³⁰⁹ Poor elderly persons between fifty

301. See Nat'l Coalition for the Homeless, *supra* note 49.

302. See *id.*; see also Saul Friedman, *Family & Relationships; Gray Matters; Census Bureau Counts More Seniors in Poverty*, *NEWSDAY*, Oct. 15, 2002, at B18.

303. U.S. DEP'T OF HOUS. & URBAN DEV., RENTAL HOUSING ASSISTANCE—THE CRISIS CONTINUES: 1997 REPORT TO CONGRESS ON WORST CASE HOUSING NEEDS (1998), available at <http://www.huduser.org/publications/affhsg/worstcase/finding6.html> (last visited Mar. 15, 2003).

304. See, e.g., KATHRYN H. PORTER ET AL., CTR. ON BUDGET & POL'Y PRIORITIES, SOCIAL SECURITY AND POVERTY AMONG THE ELDERLY: A NATIONAL AND STATE PERSPECTIVE ix (1998) (citing census data demonstrating that, in 1997, Social Security lifted 11.4 million elderly people out of poverty and reduced the poverty rate among the elderly by three-quarters), available at <http://www.cbpp.org/4-8-99socsec.pdf> (last visited Mar. 15, 2003).

305. See Nat'l Coalition for the Homeless, *supra* note 49.

306. See 42 U.S.C. § 414(a) (1991).

307. See 42 U.S.C. § 1381-1382c.

308. See 20 C.F.R. §§ 416.401-416.586 (2003) (discussing the amount of SSI grants).

309. See ANN O'HARA & EMILY MILLER, TECHNICAL HOUS. COLLABORATIVE & CONSORTIUM FOR CITIZENS WITH DISABILITIES HOUS. TASK FORCE, PRICED OUT IN 2000: THE TREND CONTINUES (2001) (finding that in 2000, people with disabilities

and sixty-five who are not disabled, and thus not eligible for SSI, are in a particularly precarious position. They must instead rely on state welfare payments, which vary by state and do not exist in all states, because they also do not qualify for federal welfare benefits unless they have dependent children.

In addition, the 1996 welfare reform act bars many immigrants, including immigrants lawfully in the United States, from receiving many federal benefits including food stamps and SSI.³¹⁰ These restrictions disproportionately impact elderly homeless immigrants, many of whom may have lived in the United States for years, because working can become more difficult with age, particularly for those whose prior work has been in unskilled, labor-intensive jobs.

Elderly homeless people are also particularly vulnerable to crime, abuse, and disease. Studies have demonstrated they are frequently robbed or assaulted at higher rates than other age groups.³¹¹ As a result, many avoid homeless shelters, where they feel especially vulnerable, and instead sleep on the street. Elderly homeless individuals are also more prone to both medical and psychiatric problems, which may endanger their health and safety.

While government programs to provide more affordable housing and increase income levels represent the most effective way to reduce homelessness among the elderly, advocates can still play an important role in addressing the needs of the elderly poor. For example, advocates can assist older individuals under the age of sixty-five in obtaining SSI benefits based on disability after their claims are denied. While many meritorious claims are initially denied, success rates are high on appeal,³¹² particularly when the claimant receives legal advice or representation. Advocates can also help elderly persons with other issues, such as public assistance and food stamps, eviction prevention (for those not yet homeless), immigration issues, and access to health care.

receiving SSI benefits needed to pay—on a national average—ninety-eight percent of their SSI benefits in order to be able to rent a modest one-bedroom unit at Fair Market Rent), available at <http://www.c-c-d.org/POin2000.html#e> (last visited Mar. 15, 2003).

310. 8 U.S.C. § 1611(a) (2002) (barring any and all aliens except “qualified aliens” for most federal benefits); *id.* § 1612(a) (barring some groups of “qualified aliens” for various federal benefits, including SSI and food stamps).

311. *See, e.g.*, Nat’l Coalition for the Homeless, *supra* note 49.

312. *See supra* note 243 and accompanying text. In fact, the older a person is, the more favorable the standard for establishing disability, at least insofar as it impacts exertional activities. *See* 20 C.F.R. pt. 404(P), app. 2, §§ 200-204 (setting forth guidelines to determine disability for individuals who have an exertional impairment and whose condition prevents them from returning to their past employment).

D. Defining Issues and Shaping Perceptions Through Advocacy

Legal advocacy also can play an important role in shaping the public's attitudes about homelessness and deepening its understanding of this complex problem.³¹³ It can foster political change by pressuring policymakers to act.³¹⁴ Certainly, lawyers have helped focus public attention on the issues, including by opposing efforts by cities to criminalize homelessness.³¹⁵ By framing homelessness in structural rather than personal terms, lawyers have helped cause the public to blame homelessness—at least to some extent—on the economy and housing market rather than individual “failings” like mental illness or chemical dependency.³¹⁶ This is important because much of the social science research on homelessness tends to focus not on housing or poverty issues, but on the differential diagnosis of mental illness among the homeless themselves.³¹⁷

Still, negative stereotypes of homeless people remain. Advocates should continue to counter the mistaken view, based in part on common observations of the more visible street homeless population,³¹⁸ that homelessness is more about mental illness and sub-

313. See generally Minow, *supra* note 207, at 294 (“Because lawyers work with words, they can tell stories not only to courts and legislatures, but also to broader publics.”).

314. See generally Gary Bellow, *Steady Work: A Practitioner's Reflections on Political Lawyering*, 31 HARV. C.R.-C.L. L. REV. 297, 300 (1996).

315. See Benjamin S. Waxman, *Fighting the Criminalization of Homelessness: Anatomy of an Institutional Anti-Homeless Lawsuit*, 23 STETSON L. REV. 467, 491 (1994) (describing the importance of having an effective public relations strategy when commencing homeless rights lawsuits).

316. See Blasi, *supra* note 18, at 221.

317. See BURT ET AL., *supra* note 3, at 98 (noting strong bias of social science data towards long-term homeless who tend to have more alcohol, drug, and mental health problems); Blasi, *supra* note 18, at 228 (noting that while negative perceptions of welfare recipients are influenced by beliefs about poverty and race, negative perceptions of homelessness tend to be based on associations between personal “failures” like mental illness and substance abuse that divert attention from structural forces like the affordable housing crisis and inadequate income supports); KUSMER, *supra* note 10, at 230 (noting the sociological studies of the homeless population in skid rows during the 1950s and 1960s emphasized deviant personal habits, such as drinking habits); Tusan, *supra* note 67, at 1147 (citing Marybeth Shinn & Beth C. Weitzman, *Research on Homelessness*, 46 J. SOC. ISSUES 1, 3 (1990)).

318. See, e.g., Nina Bernstein, *Bloomberg and the Man on the Street: Reaching Out to the Homeless, Mayor Finds No Easy Answer*, N.Y. TIMES, Jan. 20, 2002, § 1, at 31. (describing studies about “the chronically homeless—deranged, debilitated people who dominate the public image of the problem.”); see also KUSMER, *supra* note 10, at 242 (“Because many homeless do not act or look ‘normal,’ people readily jump to the conclusion that the homeless population is composed primarily of potential criminals, psychotics, or drug addicts.”).

stance abuse than poverty. It is not that mental illness and chemical dependency are unimportant factors in explaining homelessness, but rather that these factors alone generally do not explain why someone becomes or remains homeless. Advocates should find (and, to the extent possible, publicize) cases that show how easy it is for people to fall through the cracks and become homeless due to extreme poverty. They should pursue litigation that exposes the socio-economic forces beneath individual hardships, putting homelessness in the context of larger policy issues and encouraging long-term solutions by decision-makers in the political arena.

E. Lawyering in Holistic Settings

In recent years, there has been an increase in interdisciplinary or holistic approaches to address the range of needs—legal and non-legal—of low-income clients.³¹⁹ Some models involve increased cooperation between lawyers and social workers,³²⁰ while others employ a broader multidisciplinary framework involving not only law and social work, but also medical and psychiatric treatment, nutrition, counseling, job training, and other services.³²¹

A multidisciplinary model in which layers work alongside other professionals represents an effective way to address the range of needs confronting homeless individuals and families. Unfortunately, legal services organizations generally do not or, more likely, cannot provide the case management, social work, medical and psychiatric treatment, job training, and substance abuse counseling that many homeless people need. Conversely, social services agencies and community based organizations assisting homeless people tend not to provide legal assistance even though their clients often

319. See, e.g., Stacy L. Brustin, *Legal Services Provision Through Multidisciplinary Practice: Encouraging Holistic Advocacy While Protecting Ethical Interests*, 73 U. COLO. L. REV. 787, 799 (2002) (outlining ethical issues in multidisciplinary practice in not-for-profit service organizations); Paula Galowitz, *Collaboration Between Lawyers and Social Workers: Re-examining the Nature and Potential of the Relationship*, 67 FORDHAM L. REV. 2123, 2126 (1999) (describing ways in which social workers can assist in the delivery of legal services by helping lawyers in understanding and relating to clients); Christina T. Pierce et al., *Social Work and Law: A Model for Implementing Social Services in a Law Office*, NAT'L ASS'N ELDER L. ATT'Y Q., Spring 2003, at 3 (2000) (describing advantages of a holistic approach in addressing financial, legal, and psychosocial issues confronting elderly clients); Louise G. Trubek & Jennifer J. Farnham, *Social Justice Collaboratives: Multidisciplinary Practices for People*, 7 CLINICAL L. REV. 227, 231-33 (2000) (surveying different "social justice collaboratives").

320. Galowitz, *supra* note 319, at 2124-26.

321. See Brustin, *supra* note 319, at 792-95.

confront issues involving public benefits, housing, immigration, family law, consumer law, and other matters that could best be addressed by legal advice or actual representation in administrative agencies or courts.

Existing evidence suggests the value of interdisciplinary approaches that provide outreach services to homeless people, particularly those who are mentally ill.³²² It also indicates the importance of integrating the allocation and delivery of services for homeless people through continuum of care models that seek to provide services from the time people are on the street or in shelters until they find permanent housing.³²³ Yet, the existing continuum of care models generally do not include legal services on various issues. Incorporating legal advocacy into existing social service models would provide better and more comprehensive services and, in turn, improve the quality of the legal advocacy by linking it to services addressing other, non-legal issues confronting homeless clients. Collaboration between lawyers and other professionals like social workers will also make lawyers more aware of the psychological aspects of their clients' legal problems.³²⁴

Incorporating legal advocacy into programs that provide stabilizing after-care to formerly homeless people represents another effective way of combating homelessness. Many homeless individuals and families who have obtained permanent housing are generally vulnerable to becoming homeless again. Often, a glitch with their welfare benefits, a problem with their landlord, or a setback at work is all that it takes to start the downward spiral towards homelessness. While social service professionals can address issues like medical and psychiatric treatment or substance abuse counseling, lawyers can provide the critically needed assistance in

322. See, e.g., Erickson & Page, *supra* note 206, at 6-7 to 6-8; Gary A. Morse et al., *Outreach to Homeless Mentally Ill People: Conceptual and Clinical Considerations*, 32 COMMUNITY MENTAL HEALTH J. 261, 265-68 (1996); Marcus Plescia et al., *A Multidisciplinary Health Care Outreach Team to the Homeless: The 10-year Experience of the Montefiore Care for the Homeless Team*, 20 COMMUNITY HEALTH 58, 60-61 (1997).

323. See, e.g., BURT ET AL., *supra* note 3, at 269 (describing HUD's efforts to make continuums of care the norm); Stanley S. Herr & Stephen M.B. Pincus, *A Way To Go Home: Supportive Housing and Housing Assistance Preferences for the Homeless*, 23 STETSON L. REV. 345, 399 (1994) ("To break the cycle of homelessness in each community, local governments will need to build a continuum of services to assist people at each stage of homelessness.").

324. See Galowitz, *supra* note 319, at 2128-30 (discussing the importance of social work principles of empathy when providing assistance to low-income individuals).

matters like public benefits or eviction defense to prevent future homelessness.³²⁵

Legal advice or representation could also be added to existing social services for homeless people who have been placed in supportive housing programs to help prevent their becoming homeless again.³²⁶ These programs, which provide subsidized permanent housing and accompanying social services to homeless people, mainly to single adults with mental disabilities, have proven remarkably successful in preventing future homelessness.³²⁷ They could, however, further benefit from legal assistance in helping clients deal with issues like access to health care, public benefits, and barriers to employment.

Of course, lawyers practicing in such multidisciplinary settings will need to balance a program's goal of addressing clients' social, psychological, and medical needs while retaining principles of zealous advocacy that govern the legal profession.³²⁸ Tension may arise, for example, between lawyers and social workers on how to best handle an issue based on the different principles and rules governing their respective professions. Programs utilizing a holistic approach will need to develop a system to address ethical issues like confidentiality, conflicts of interest, and independence of professional judgment.³²⁹

An ideal model would thus integrate legal advocacy with other services to address the myriad of problems confronting homeless people. The wide range of issues³³⁰ and the current patchwork na-

325. See *supra* Part III.B.

326. Cf. Dennis P. Culhane et al., *Public Service Reductions Associated with Placement of Homeless Persons with Severe Mental Illness in Supportive Housing*, 13 HOUSING POL'Y DEBATE 107, 111 (2002) (describing success and cost-effectiveness of supportive housing programs); see Barrow et al., *supra* note 206, at 41-42 (noting the importance of access to public benefits and housing-related services in preventing the formerly homeless from becoming homeless again); Watson, *supra* note 113, at 361-62.

327. See Martha R. Burt, *Demographics and Geography: Estimating Needs*, in PRACTICAL LESSONS, *supra* note 38, at 1-19 (noting that many programs have been able to retain about eighty percent of the previously homeless people they serve in decent, stable housing arrangements); Dennis P. Culhane, *New Strategies and Collaborations Target Homelessness*, 4 HOUSING FACTS & FIGURES, 2002, at 1, 4 (describing the potential value of supportive housing in addressing the needs of the approximately 200,000 to 300,000 chronically homeless individuals in the United States).

328. See Brustin, *supra* note 319, at 827.

329. See generally *id.* at 837-64; Galowitz, *supra* note 319, at 2134-47 (describing tension between "advocacy" model of lawyers and "best interests" model of social workers).

330. See, e.g., Karen Houppert, *For Her Own Good*, NATION, Feb. 4, 2002, at 21 (describing how the intersection of low-wage employment, restrictions on welfare, the

ture of social welfare protections³³¹ underscore the value of more holistic approaches to homelessness.

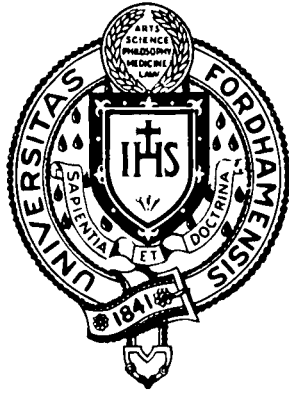
CONCLUSION

Lawyers have played an important role in addressing homelessness over the past two decades. They helped win an expansion of emergency shelter services during the 1980s and mitigate the effects of the increasing criminalization of homelessness since the 1990s. In addition, litigation has helped raise awareness about and shape public attitudes towards homelessness.

Yet, existing strategies have proven limited in addressing the underlying causes of homelessness. Legal advocacy cannot, of course, "solve" a problem like homelessness, which ultimately derives from the basic structure of our political, economic, and social system. Absent a strong political commitment to creating more affordable housing and addressing other aspects of poverty, many people will continue to be homeless. Yet, lawyers can make an important difference both in the lives of individual clients and on larger policies. This Article has attempted to point out some possible future directions of homeless legal advocacy that build on past approaches and concentrate on other areas that offer a promising way to address the problem.

costs of quality child care, and the lack of affordable housing all contributed to the periodic homelessness of a single mother and her daughters).

331. See Edelman, *supra* note 231, at 548.



CHRONIC HOMELESSNESS: EMERGENCE OF A PUBLIC POLICY

*Martha R. Burt**

INTRODUCTION

The past two years have witnessed a major shift in public commitment to end chronic homelessness within the next decade. This Article examines the phenomenon of chronic homelessness and its emergence as the focus of a significant policy transformation. It first sets the scene with a brief review of why homelessness remains a significant social problem after twenty years of public and private investment in homeless assistance networks. It then looks at definitions of homelessness in general, and chronic homelessness in particular. With respect to policy, it traces a story that starts with research. Initial research showed that even the most chronic, disabled, street-dwelling homeless people will accept and remain in housing, given the right configuration and the right supportive services. Research on program effectiveness was followed by analyses showing near break-even public costs for providing the housing. The story continues with evidence that the numbers of chronically homeless people who would need housing are within a manageable range. The Article concludes by examining what advocates have done and are still doing with the research evidence, and an overview of public commitments and the effort it will take to assure that they are fulfilled.

I. CAUSES OF HOMELESSNESS

Two types of factors are generally acknowledged as causing homelessness in the sense that they create the conditions under which people are more or less likely to find themselves homeless.¹ Factors of the first type are structural—they are larger societal trends and changes that affect broad segments of a population.² These include changes in housing markets and land use, employment opportunities, the quality and relevance of public education,

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1. MARTHA BURT ET AL., *HELPING AMERICA'S HOMELESS: EMERGENCY SHELTER OR AFFORDABLE HOUSING?* 7 (2001); Paul Koegel et al., *The Causes of Homelessness*, in *HOMELESSNESS IN AMERICA* 25 (Jim Baumohl ed., 1996).

2. BURT ET AL., *supra* note 1, at 7; Koegel et al., *supra* note 1, at 26-27.

institutional supports for people with disabilities, and discriminatory policies of several varieties.³ If housing prices go up, all other things being equal, fewer people can afford housing.⁴ If unemployment rises, or if pay levels of the most available jobs remain too low relative to the price of housing, fewer people can afford housing.⁵ If public education and other institutions do not prepare most people to obtain jobs that pay a living wage, more people will be at risk of homelessness.⁶ And so on. Structural factors determine why levels of homelessness rise or fall in *this* place, at *this* time, rather than in some other place or at some other time.⁷

Factors of the second type are individual—they are the conditions and circumstances that make particular people particularly vulnerable to homelessness.⁸ These include various disabilities (for example, mental illness, developmental disabilities, and physical disabilities), illnesses, illiteracy, and addictions.⁹ They may also include personal circumstances such as domestic violence, too many to support on one income, having no family to rely on (for example, because one has been in foster care, or because of familial abuse), apartment condemnation, or fire, flood, hurricane, or war.¹⁰

A third factor, public policies, may mitigate structural and individual factors that determine the ultimate level of “literal” homelessness in a particular time and place.¹¹ Emergency relief often can provide this for victims of natural disasters or war. A guarantee of housing may afford this for citizens of several European countries. Income and other support for people with disabilities severe enough to prevent their working might prevent their becoming homeless.¹² There will always be some people without roofs, communities, or families. The sheer number of people experiencing literal homelessness in the United States during the past two decades, however, indicates a very unfortunate convergence of

3. BURT ET AL., *supra* note 1, at 7; Koegel et al., *supra* note 1, at 26-29.

4. Koegel et al., *supra* note 1, at 26-29.

5. *Id.*

6. *Id.*

7. BURT ET AL., *supra* note 1, at 8-10.

8. BURT ET AL., *supra* note 1, at 8; Koegel et al., *supra* note 1, at 25, 29-33.

9. BURT ET AL., *supra* note 1, at 8; Koegel et al., *supra* note 1, at 25, 29-33.

10. BURT ET AL., *supra* note 1, at 8; Koegel et al., *supra* note 1, at 25, 29-33.

11. BURT ET AL., *supra* note 1, at 6 (“‘Literal’ homelessness is defined on a day-by-day basis, and involves sleeping either in a facility serving homeless people, in accommodations paid for by a voucher from a program serving homeless people, or in places not meant for human habitation.”).

12. *Id.* at 327-28.

structural and individual factors that, to date, have not been countered with public policies adequate to reduce their ability to generate homelessness. The campaign to end chronic homelessness during the coming decades will arise from recognizing that public policy changes could make a substantial difference.

II. DEFINING HOMELESSNESS AND CHRONIC HOMELESSNESS

Homelessness has been defined in various ways in different eras, countries, and circumstances. Historically, ideas of homelessness have usually incorporated one or more of the concepts of being without place (not being “from here”), without family, or without housing.¹³ In the United States during the last two decades, federal policy has been governed by the definition articulated in the principal federal legislation related to homelessness—the McKinney-Vento Homeless Assistance Act, subsequently renamed the Stewart B. McKinney Homeless Assistance Act (“McKinney Act”)¹⁴ and subsequent reauthorizations and expansions.¹⁵ The Act defines a person as homeless if the “individual lacks a fixed, regular, and adequate nighttime residence.”¹⁶ People sleeping in “a public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings,” as well as those staying in shelters for homeless people, are part of the definition.¹⁷

To operationalize the *public policy* of the Act’s definition, at a practical level it is often translated into the narrowest of working definitions—having been without housing *last night*, or expecting to be without housing *tonight*. Thus, people in precarious circumstances who still manage to stay in conventional dwellings by moving every few days or weeks from one relative’s house to another

13. See BURT ET AL., *supra* note 1, at 2-5; KIM HOPPER, RECKONING WITH HOMELESSNESS (THE ANTHROPOLOGY OF CONTEMPORARY ISSUES) 16-17 (2003); Kim Hopper & Jim Baumohl, *Held in Abeyance: Rethinking Homelessness and Advocacy*, 37 AM. BEHAVIORAL SCIENTIST 522, 522-25 (1994); Kim Hopper, *Homelessness Old and New: The Matter of Definition*, 2 HOUSING POL’Y DEBATE 757, 757-814 (1991); Kim Hopper & Jim Baumohl, *Redefining the Cursed Word: A Historical Interpretation of American Homelessness*, in HOMELESSNESS IN AMERICA, *supra* note 1, at 3-6.

14. The McKinney-Vento Homeless Assistance Act, *renamed*, Stewart B. McKinney Homeless Assistance Act, Pub. L. No. 100-77, 101 Stat. 482 (1987) (codified as amended at 42 U.S.C. § 11301 *et seq.* (1995)).

15. For a description of subsequent reauthorizations and expansions of the McKinney Act, see the U.S. Department of Housing and Urban Development website, at <http://www.huduser.org/publications/homeless/mckin/intro.html> (last visited Mar. 15, 2003).

16. 42 U.S.C. § 11302(a)(1).

17. *Id.* § 11302(a)(2)(C).

would not be considered homeless until they reached the situation of having nowhere to go but the streets or a shelter.

Similarly, someone whose pension or disability check provides enough money to afford a cheap hotel room for three weeks out of every month, but who resorts to the streets until the next check arrives would only be considered homeless at the end of the month, even if this pattern has lasted for years. The consequence of this policy-driven working definition has been the development of an extensive network of homeless assistance programs that help to ameliorate the realities of homelessness for those already without housing.¹⁸ But most existing homeless-specific programs can do little to prevent homelessness or change the forces that continue to generate homelessness.

III. CHARACTERISTICS OF CHRONICALLY HOMELESS PEOPLE

Regardless of how “chronic” is defined, the population is largely male (seventy-seven to eighty-six percent), about sixty percent are middle-aged (between thirty-five and fifty-four years old), and most are very disabled.¹⁹ Between eighty-three and eighty-seven percent, again depending on definitions of chronic, have mental health, alcohol, and/or drug problems.²⁰ Thus, ending chronic homelessness means assisting people who have one or more severe disabilities, and often have a history of resisting efforts to help them address those disabilities.

IV. PROGRAM SUCCESS: EVIDENCE THAT SOMETHING WORKS

To make a new policy, one must know what will work and how much will be needed, after which advocacy focuses on the appropriateness of acting on this knowledge. In the 1980s, there was no evidence of what would work to bring chronically homeless people into housing and induce them to stay there. An early contribution of public policy to the knowledge base of what works were the re-

18. BURT ET AL., *supra* note 1, at 12.

19. U.S. DEP'T OF HOUS. & URBAN DEV., HOMELESSNESS: PROGRAMS AND THE PEOPLE THEY SERVE—HIGHLIGHTS REPORT: FINDINGS OF THE NATIONAL SURVEY OF HOMELESS ASSISTANCE PROVIDERS AND CLIENTS (Dec. 1999) [hereinafter 1999 HIGHLIGHTS REPORT], *available at* www.huduser.org/publications/homeless/homelessness/highrpt.html (last visited Mar. 15, 2003); Martha R. Burt, *Homeless Families, Singles, and Others: Findings from the 1996 National Survey of Homeless Assistance Providers and Clients*, 12 HOUSING POL'Y DEBATE 737, 741-47, 763-68 (2001), *available at* http://www.fanniemaefoundation.org/programs/hpd/pdf/HPD_1204_burt.pdf (last visited Mar. 15, 2003).

20. 1999 HIGHLIGHTS REPORT, *supra* note 19; Burt, *supra* note 19, at 763-68.

search-demonstration programs authorized by the McKinney Act to see what would work to end homelessness among chronically homeless persons with severe mental illness and/or chronic substance abuse.²¹ Starting in the early 1990s, with results appearing during the middle and end of that decade, these studies consistently found that *if housing was supplied*, people would come in from the streets and remain stably housed. Without the housing component, however, no amount of other services affected levels of homelessness.²² The approach that worked was permanent supportive housing.²³ The housing could take any one of many configurations—apartments, houses, group houses, single room occupancy hotel rooms (“SROs”); the supports could be offered through many mechanisms—on site staff, drop-in, community-based teams.²⁴ But the housing component was essential; services alone were not enough. Practitioners and advocates quickly got the message—this *can* be done, but it takes housing!

V. NUMERIC ESTIMATES: EVIDENCE OF REASONABLE SCOPE

The next question for policy makers and advocates was: how much is needed? Some local communities have estimates or counts of homeless populations, and even of chronically homeless or street-dwelling homeless people.²⁵ Some of these communities have already used their estimates as the basis for local campaigns to end chronic homelessness.²⁶ In order to stimulate national pol-

21. 42 U.S.C. § 11302.

22. Deirde Oakley & Deborah L. Dennis, *Responding to the Needs of Homeless People with Alcohol, Drug, and/or Mental Health Disorders*, in HOMELESSNESS IN AMERICA, *supra* note 1, at 179-80; David L. Shern et al., *Housing Outcomes for Homeless Adults with Mental Illness: Results from the Second-Round McKinney Program*, 48 PSYCHIATRIC SERVICES 239, 239-41 (1997); Marybeth Shinn & Jim Baumohl, *Rethinking the Prevention of Homelessness*, in U.S. DEP'T OF HOUS. & URBAN DEV. & U.S. DEP'T OF HEALTH & HUMAN SERVS., PRACTICAL LESSONS: THE 1998 NATIONAL SYMPOSIUM ON HOMELESSNESS RESEARCH 13-1 (Linda B. Fosburg & Deborah L. Dennis eds., 1999).

23. NAT'L ALLIANCE TO END HOMELESSNESS, A PLAN: NOT A DREAM—HOW TO END HOMELESSNESS IN TEN YEARS 10 (2000), available at <http://www.naeh.org/pub/tenyear/10yearplan.pdf> (last visited Mar. 15, 2003).

24. *See id.* at 11.

25. *Id.* at 3.

26. Nat'l Alliance to End Homlessness, State and Local Plans to End Homelessness, at <http://www.naeh.org/localplans> (last visited Mar. 15, 2003). In Ohio, Columbus and Franklin Counties have relied upon gathered estimates, as has the city of Philadelphia. CONTINUUM OF CARE STEERING COMM., COLUMBUS & FRANKLIN COUNTY, 10-YEAR PLAN TO END CHRONIC HOMELESSNESS: COLUMBUS AND FRANKLIN COUNTY IMPLEMENTATION PLAN JULY 2002-DECEMBER 2003 (2002), available at http://www.csb.org/What_s_New/Ending%20Chronic%20Homelessness%20Cover.htm

icy, however, national data is needed. The only source for national estimates on the homeless population is the National Survey of Homeless Assistance Providers and Clients ("NSHAPC"), conducted in 1996, with point-in-time and annual estimates of the homeless population published in early 2000.²⁷

As illustrated in Table 1, subsequent analyses of the same data, published here for the first time, have utilized combinations of "spell length" and "number of times homeless" to create different definitions of "chronic" homelessness. These analyses then estimated how many single adults might fit each category. Using only information about the length of a person's current homeless spell, a definition requiring two years of homelessness to qualify as chronic includes 28.8 percent of all single homeless adults. Reducing the required time to one year increases the proportion considered chronic to 42.7 percent. The pattern examined for multiple episodes (four or more within the past five years) captures the smallest proportion of single homeless adults (16.4 percent). Combining the two criteria (length of current spell and multiple episodes) increases the proportion of single homeless adults who would be defined as chronic, and also illustrates that some people qualify under both criteria—they have had several homeless spells *and* their current spell has lasted at least one or two years.

Table 1 Estimates of the Number of Chronically Homeless Single Adults ¹					
	Alternative Definitions of "Chronic" Homelessness				
Numbers and Characteristics	1 year +	2 years +	4+ episodes in 5 years	1 year + OR 4+ episodes in 5 years	2 years + OR 4+ episodes in 5 years
Percent of All Single Homeless Adults	42.7	28.8	16.4	50.7	40.2
Estimates of Numbers ¹					
Based on October 1996 Estimate	126,000	85,000	48,000	149,000	118,000

(last visited Mar. 15, 2003); GREATER PHIL. URBAN AFFAIRS COALITION, OUR WAY HOME: A BLUEPRINT TO END HOMELESSNESS IN PHILADELPHIA 8-9 (1998), *available at* <http://www.homelessphila.org/gpuac.pdf> (last visited Mar. 15, 2003). The National Alliance to End Homelessness provides links to the plans for thirteen states and localities on its website. Nat'l Alliance to End Homelessness, *supra*.

27. MARTHA R. BURT & LAUDON Y. ARON, URBAN INST., AMERICA'S HOMELESS II—POPULATIONS AND SERVICES (Feb. 1, 2000), *available at* <http://www.urban.org/url.cfm?ID=900344> (last visited Mar. 15, 2003). This work was later published in detail in BURT ET AL., *supra* note 1.

Based on February 1996 Estimate	228,000	154,000	87,000	270,000	214,000
Characteristics—Percentages:					
Male	82	79	87	82	81
Aged 35 to 54	64	63	67	63	63
Past Year Substance Abuse Problem	68	63	80	69	67
Past Year Mental Health Problem	54	58	45	54	55
Past Year either Substance Abuse or Mental Health Problem or Both	84	82	87	84	83
Characteristics—Estimates of Numbers: ^{1,2}					
Past Year Substance Abuse Problem	86/166	53/96	38/70	104/188	79/144
Past Year Mental Health Problem	68/124	49/89	22/39	80/145	84/117
Past Year either Substance Abuse or Mental Health Problem or Both	106/192	70/126	42/76	125/227	98/178
<i>Source:</i> Urban Institute analysis of weighted 1996 NSHAPC data for currently homeless single adults; <i>n</i> = 2473. ¹ Numerical estimates are for a single point in time, either October or February 1996. ² Estimates are in 1,000s; first and second numbers are based on October and February estimates, respectively.					

In terms of numbers, estimates for a single point in time range from a low of 48,000 (based on October estimates and a definition using multiple episodes—column 3) to a high of 270,000 (using February estimates and a definition of “at least one year *or* four or more episodes within the last five years”—column 4). Numbers for longer lengths of time such as a year might be as much as twice as large, as people with past homeless episodes come back into homelessness or already homeless people’s spells lengthen. But because the estimates are for a *chronic* population, far less in-and-out movement is expected during a year than would be true for the homeless population as a whole, which may, in the course of a year, see as many as six times as many people experience homelessness as would be true at a single point in time. Roughly speaking, therefore, we could assume that over the course of a year between 150,000 and 250,000 single adults experience chronic homelessness. In the eyes of many people, providing housing and supportive services for a population of this size is manageable.

Most chronically homeless people have significant personal vulnerabilities, such as severe mental illness, substance abuse, or

both.²⁸ These problems often lead the public and policy makers to believe that chronically homeless people will resist housing and services.²⁹ But, as the evidence cited earlier shows, most will accept housing and services if they are structured appropriately, and most will stay in that housing rather than return to the streets.³⁰

VI. MONEY: EVIDENCE OF REASONABLE COSTS

Providing housing and supportive services to chronically homeless people costs a lot of money, which is one reason why communities do not do more of it.³¹ Chronically homeless people, however, also cost communities a lot of money when they are *not* housed, as well as reducing the quality of life for homeless and non-homeless alike.³² Databases showing shelter use by individuals allow us to see that relatively few (about ten to fifteen percent) of the people homeless at any given time are continuously homeless, or return to homelessness regularly and never establish stable residence.³³ Further, these few take up at least half of the resources available in the system of emergency response to homelessness—using fifty percent or more of the available shelter bed nights, in quite a number of cities capable of providing this information.³⁴ So they are being housed (in shelters), just badly housed, and expensively housed. Moreover, in shelters they do not get much help to leave homelessness.³⁵

In addition to shelter and other resources of the homeless assistance system, chronically homeless people drain the resources of hospital emergency rooms and inpatient services, psychiatric outpatient and inpatient services, substance abuse services, jails and prisons, veterans' services, and other public agencies.³⁶ Dennis Culhane and his colleagues at the University of Pennsylvania have recently completed works on supported housing programs in New

28. See *supra* notes 8-10 and accompanying text.

29. Koegel et al., *supra* note 1, at 146.

30. See *supra* Part IV.

31. NAT'L ALLIANCE TO END HOMELESSNESS, *supra* note 23, at 10-11.

32. *Id.*

33. *Id.*

34. Dennis P. Culhane et al., *Public Shelter Admission Rates In Philadelphia and New York City: Implications for Sheltered Population Counts*, 5 HOUSING POL'Y DEBATE 107, 109-10, 121 (1994).

35. *Id.* at 132-37.

36. Dennis P. Culhane et al., *Public Service Reductions Associated with Placement of Homeless Persons with Severe Mental Illness in Supportive Housing*, 13 HOUSING POL'Y DEBATE 107, 111, 116, 120-35 (2002), available at www.fanniemaefoundation.org/programs/hpd/pdf/hpd_1301_culhane.pdf (last visited Mar. 15, 2003).

York City and Connecticut, documenting the extensive public costs incurred by these systems in caring for chronically homeless adults.³⁷ Results reveal that the cost of *not* offering housing and supportive services is nearly equal to the cost of providing them. This cost analysis was the final piece of the puzzle that has stimulated recent commitments to ending chronic homelessness.

VII. DEVELOPING A PUBLIC POLICY

Research provided the first step toward developing today's emphasis on ending chronic homelessness. Early federally funded demonstrations showed that very long-term homeless people with many disabilities and problems come directly into housing and stay there, with appropriate services and supports. Subsequent studies and evaluations have demonstrated the same thing. National survey data provided evidence that the chronically homeless population was of reasonable size. Finally, financial analyses showed that the public costs of *not* providing housing and supportive services for this population came very close to equaling the costs of making housing available.

Advocacy followed the research. Armed with the evidence that it was possible to get chronically homeless people off the streets, that the numbers were not that large, that the people affected have many vulnerabilities, and that it does not even cost very much, advocates prepared the case. Some organizations and communities had already been working to develop permanent supportive housing, including the Massachusetts Housing and Shelter Alliance in partnership with the Massachusetts Department of Mental Health, Columbus/Franklin County, Ohio's Community Shelter Board in its Rebuilding Lives initiative, and the Corporation for Supportive Housing in projects in eight states. What advocates began to promote was *national* commitment.

Advocacy was an early step, undertaken to convince Congress to make permanent supportive housing a priority within federal homeless funding streams. Such housing is an essential element in any plan to end homelessness among chronically homeless individuals. For the first time, for federal fiscal year 1999, the United States Department of Housing and Urban Development ("HUD")

37. *Id.* at 108-09 (discussing supported housing programs in New York City); see ARTHUR ANDERSON LLP ET AL., THE CORP. FOR SUPPORTIVE HOUS., CONNECTICUT SUPPORTIVE HOUSING DEMONSTRATION PROGRAM EVALUATION: REPORT HIGHLIGHTS 1-2 (2002) (discussing supported housing programs in Connecticut), available at <http://documents.csh.org/pdfs/EvalHighlights.pdf> (last visited Mar. 15, 2003).

appropriation bill carried the stipulation that thirty percent of HUD's funding for the supported housing program be set aside for permanent supportive housing. Advocacy and bipartisan Congressional support has seen to it that the thirty percent set-aside has been maintained; additional funds have also been made available to assure renewals of permanent supportive housing programs whose initial grants were expiring.

The National Alliance to End Homelessness kicked off a campaign during its 2000 annual conference, unveiling its "Ten Year Plan to End Homelessness."³⁸ The part of the plan pertaining to ending chronic homelessness marshaled the evidence reviewed above, then laid out steps that will be necessary to achieve the goal, including the now oft-repeated phrases of:

- "Opening the Back Door"—providing housing to help people leave homelessness.³⁹
- "Closing the Front Door"—assuring that people leaving institutions such as mental hospitals, substance abuse treatment facilities, and the foster care system do not leave into homelessness.⁴⁰
- "Building Infrastructure"—creating more housing, more earning capacity, and better preventive services.⁴¹

The National Alliance worked to build partnerships and get commitments from federal agencies, and eventually also from the White House.⁴² Early in his tenure, National Alliance members visited HUD Secretary Mel Martinez and convinced him that ending chronic homelessness was something that could be done, and should be done.⁴³ The fact that there was strong Congressional backing for providing federal funds to the effort also helped move HUD toward a commitment to work on ending chronic homelessness.⁴⁴ By the National Alliance's 2001 annual conference the

38. NAT'L ALLIANCE TO END HOMELESSNESS, *supra* note 23, at 1.

39. *Id.* at 10.

40. *Id.* at 9.

41. *Id.* at 13.

42. See L.A. Homeless Servs. Auth., Strategic Plan to End Homelessness, at <http://www.lahsa.org/strategicplan.htm> (last visited Mar. 15, 2003).

43. NAT'L ALLIANCE TO END HOMELESSNESS, ANNUAL REPORT 2001, at 15 (2001), available at <http://www.naeh.org/pub/anreport2001.pdf> (last visited Mar. 15, 2003).

44. See *Congress Nearing Adjournment, Crucial Issues Still Unresolved*, ALLIANCE, Sept.-Oct. 2000, at 1, 3, at <http://www.naeh.org/pub/newslet/165issue.pdf> (last visited Mar. 15, 2003).

HUD Secretary was a featured speaker, discussing the need to end chronic homelessness in the United States.⁴⁵

By July 2002, the Federal Interagency Council on Homelessness was revived (it had been moribund for six years), and a staunch advocate from Massachusetts, Philip F. Mangano, was appointed as its executive director.⁴⁶ His portfolio includes working to end chronic homelessness and increasing cooperation and coordination among the major federal agencies to bring this about.⁴⁷ In July 2002, the Council was able to announce a new federal strategy to end chronic homelessness, including a substantial commitment to work on prevention (closing the front door) as well as helping people once they become homeless.⁴⁸ That commitment involved directives to three federal agencies (the Department of Health and Human Services, the Department of Housing and Urban Development, and the Department of Veteran Affairs) to develop working relationships around ending homelessness.

As part of this rapid increase in emphasis on ending chronic homelessness (two years from announcement to federal commitment is very fast in the world of politics), national commitment appears to be growing. Editorials have appeared in major newspapers calling for the end of chronic homelessness and declaring it possible to accomplish.⁴⁹ A national conference in May 2002 sponsored by the Corporation for Supportive Housing began a national campaign to get local and state jurisdictions to agree to a "compact" to end chronic homelessness by developing 150,000 units of permanent supportive housing in the next ten years. The momentum can be seen in the number of communities that are starting to think of developing their own plans to end chronic homelessness (or all homelessness) in ten years, and a number that have already developed such plans and are acting on them.

45. See Secretary Mel Martinez, Taking on the Problem that "Cannot Be Solved," Remarks at the National Alliance to End Homelessness National Conference (July 20, 2001), at www.hud.gov/news/speeches/homelessness.cfm (last visited Mar. 15, 2003).

46. Interagency Council on Homelessness, Biography—Philip F. Mangano, at www.ich.gov/library/pr02-078.html (last updated Apr. 1, 2003).

47. *Id.*

48. Press Release, Interagency Council on Homelessness, White House Interagency Council Announces New Strategy to Combat Chronic Homelessness (July 18, 2002), at www.ich.gov/library/pr02-078.html (last visited Mar. 15, 2003).

49. See, e.g., Editorial, *Ending Chronic Homelessness*, N.Y. TIMES, Mar. 13, 2002, at A24.

CONCLUSION

The question is, will the momentum of new policies and commitments carry through to actual changes in levels of chronic homelessness? Ending chronic homelessness will not be cheap, and although costs are near to break-even with current practices that leave vulnerable people on the streets, the costs come out of different agencies' pockets. It will take political will in local communities and at the federal level to capture the savings from various departments and invest them in the activities and programs that will end chronic homelessness. Further, the effort must be sustained over a decade and beyond. Columbus, Ohio, for instance, began its Rebuilding Lives campaign and its commitment to create 800 units of permanent supportive housing for street homeless people almost five years ago, and it is now less than halfway to its goal.⁵⁰ In this effort, political will is everything, but political will is usually very hard to sustain as years go by and administrations change.

The larger question also, of course, remains—what will it take to end homelessness altogether. In a recent brief, the Author discussed several steps that are widely regarded as essential if we are to see the end of all types of homelessness in this country.⁵¹ These steps are quite similar to the “building infrastructure” component of the National Alliance’s plan to end homelessness. First, housing has to become more affordable. The simplest way to do this is to subsidize housing; research indicates that the public policy that would do the most to reduce the risk of homelessness is subsidizing housing.⁵² This involves no need to build new units, no struggles with project siting or zoning or “not in my back yard” behavior. All it takes is providing those people with the most disparate housing costs in relation to their income the financial resources to remain in place. In addition, new housing needs to be created that is affordable by people earning relatively little despite working regularly—renewed incentives for producing affordable rental housing

50. MARTHA R. BURT ET AL., URBAN INST., U.S. DEP'T OF HOUS. & URBAN DEV., EVALUATION OF CONTINUUMS OF CARE FOR HOMELESS PEOPLE: FINAL REPORT 23 (2002), *available at* http://www.huduser.org/Publications/pdf/continuum_of_care.pdf (last visited Mar. 15, 2003).

51. MARTHA R. BURT, URBAN INST., WHAT WILL IT TAKE TO END HOMELESSNESS? 5 (2001), *available at* http://www.urban.org/uploadedPDF/end_homelessness.pdf (last visited Mar. 15, 2003).

52. JOHN M. QUIGLEY ET AL., PUB. POLICY INST. OF CA., HOMELESSNESS IN CALIFORNIA iii-xi (2001), *available at* http://www.ppic.org/content/pubs/R_1001JQR.pdf (last visited Mar. 15, 2003).

would greatly help the current situation of inadequate housing supply.

It is also essential that people who are poor today, and their children, have the educational and training opportunities to assure that they are not poor tomorrow. That is, we have to increase the ability of the poorest people in this country to be able to afford housing without requiring subsidies in the future. The problem is, these steps are not in political favor at this time, being seen as the old anti-poverty agenda. Instead, present federal budget proposals actually offer significant cuts in public and subsidized housing—actions that in the long run will work against the federal commitment to end chronic homelessness. Ultimately, the solution to chronic homelessness will rest on the solution to homelessness in general; the latter begets the former. Only a few communities so far have committed themselves to this larger goal.

